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Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons

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PRIVACY, AUTONOMY, AND DIGNITY IN THE PRISON: A PRELIMINARY INQUIRY CONCERNING CONSTITUTIONAL ASPECTS OF THE DEGRADATION PROCESS IN OUR PRISONS

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INTRODUCTION

The title of this essay will cause either titillation or disbelief on the part of anyone who has had any occasion to concern himself with prison. For the concepts of privacy and prison are antithetical beyond comprehension: the prison is, almost by definition, a place where the resident has lost his privacy, and his identity, and has become a number. Indeed, it has long been recognized that the entire process of prison is designed to destroy the last remnants of the dignity of the individual:

> The recruit comes into the establishment with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance, he is immediately stripped of the support provided by these arrangements. In the accurate language of some of our oldest total institutions, he begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically, if often unintentionally, mortified. He begins some radical shifts in his moral career, a career composed of the progressive changes that occur in the beliefs that he has concerning himself and significant others.
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> The processes by which a person's self is mortified are fairly standard in total institutions, analysis of these processes can help us to see the arrangements that ordinary establishments must guarantee if members are to preserve their civilian selves.
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> Admission procedures and obedience tests may be elaborated into a form of initiation that has been called "the welcome," where staff or inmates, or both, go out of their way to give the recruit a clear notion of his plight. As part of this rite of passage he may be called by a term such as "fish" or "swab," which tells him that he is merely an inmate, and, what is more, that he has a special low status even in his low group.
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> The admission procedure can be characterized as a leaving off and a taking on, with the midpoint marked by physical nakedness.

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> Leaving off of course entails a dispossession of property, important because persons invest self feelings in their possessions. Perhaps the most significant of these possessions is not physical at all, one's full name; whatever one is thereafter called, loss of one's name can be a great curtailment of the self.
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> Once the inmate is stripped of his possessions, at least some replacements must be made by the establishment, but these take the form of standard issue, uniform in character and uniformly distributed. These substitute possessions are clearly marked as really belonging to the institution and in some cases are recalled at regular intervals to be, as it were, disinfected of identifications. With objects that can be used up—for example, pencils—the inmate may be required to return the remnants before obtaining a reissue. Failure to provide inmates with individual lockers and periodic searches and confiscations of accumulated personal property reinforce property dispossession. Religious orders have appreciated the implications for self of such separation from belongings. Inmates may be required to change their cells once a year so as not to become attached to them.[1]

The process of dehumanization and degradation does not, of course, end with the introduction into the institution. Every day, in every way, the prison reinforces the inmate's image of himself as that of something less than a human. In many prisons even today, notwithstanding a raft of court[2] and administrative[3] decisions to the contrary, mail to the inmate is read, his packages opened. Information in the letters is occasionally transmitted to law enforcement officers interested in the contents. In addition to the search of his mail, the inmate will frequently be the object of body searches. Although these are *usually* performed before an

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1. E. GOFFMAN, ASYLUMS 14, 18-19 (1961). *See also* C. CLEMMER, THE PRISON COMMUNITY 100 (1940).

Judge Bazelon has suggested that the need to degrade the prisoner comes not only from the desire of prison personnel for an efficiently run institution, but inheres in our criminal law: "What I am suggesting is that the criminal serves as a scapegoat. And this as much as anything is impeding obvious and sorely needed reform in the treatment of offenders." Bazelon, *The Imperative to Punish,* ATLANTIC, July, 1960, at 44.

2. All the mail censorship cases are collected in R. SINGER, PRISONER'S LEGAL RIGHTS: A BIBLIOGRAPHY OF CASES AND ARTICLES (1972).

3. In the past year, the prison systems of Pennsylvania, New Jersey, Washington, Virginia, West Virginia, and New York City have virtually abolished mail censorship. Ohio has abolished censorship of first class mail, and a Citizens' Task Force has recommended abolishing all censorship. Atmore Prison in Alabama has agreed to no censorship. Lake v. Lee, 329 F. Supp. 196 (S.D. Ala. 1971). A California statute specifically provides for free access to all material available at news stands. CAL. PENAL CODE § 2600 (West 1970). But that, of course, does not mean that it is always followed. *See* Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971).

inmate in segregation can exercise or shower,[4] or see a visitor, they are sometimes conducted at random through the population, in the yard. They can, and the non-random searches almost inevitably do, include a rectal inspection. The thought of a rectal examination was so demeaning to Martin Sostre, a militant black kept in solitary confinement for over one year, that he refused to take his one hour of exercise per day because he would be subjected to that procedure.[5]

Searches of cells and beds of inmates can occur at any time, outside the presence of the inmate. His books, pictures, personal belongings (assuming he may keep any of those in his cell in the first place) may be treated with utter contempt. Far too often, he will return to the cell to find either (a) something there that wasn't there before; or (b) something missing. While no one would deny that officials must have some mechanism for warding off possible security problems, and for discovering truly dangerous contraband, this gross invasion of the privacy of the individual is unwarranted in many situations.

I. The Law Today

The first, and thus far the only, clear recognition of the right of fourth amendment privacy in prison has come in the area of mail censorship. Most of the cases, of course, have been decided on the basis of the first amendment right to uncensored mail,[6] the easiest and most obvious path. And that alone indicates a meaningful victory for the protection of the dignity of the inmate for it acknowledges that he is a "person" within the fourteenth amendment, a recognition bitterly contested a century ago.[7]

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4. *See* note 21, *infra.*

5. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970). The Ohio Citizens' Task Force on Corrections, Final Report C39 (1972), discussed "skin searches":

> shakedowns and skin searches are inherently humiliating and engender bitterness and resentment. In a cell shakedown, the inmates' possessions are often knocked to the floor and trampled. It is true that thorough searches of person and premises are necessary for the protection of the institutional community. Nevertheless, the basic principles of human dignity need to be observed.

6. *See* materials in R. Singer, *supra,* note 2.

7. A favorite quote from the nineteenth century to show the status of the prisoner and the way in which the law regarded him comes from Ruffin v. Commonwealth, 62 Va. 790, 796 (1871):

> A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punish-

In *Palmigiano v. Travisono*,[8] however, the court, in dictum, recognized the potential application of the fourth amendment to mail:

> Though this Court has focused mainly on the issue before it as it relates to the First Amendment, it is of the opinion that the conduct of the ACI officials of indiscriminately opening and reading all prisoner mail including that of unconvicted awaiting trial inmates, whether the same be from the inmates or members of the free society, is a violation of the Fourth Amendment. This cannot be condoned nor allowed to continue, though by necessity the full sweep of the Fourth Amendment obviously cannot apply in a prison or jail context. It is this Court's opinion that the right to be free from unreasonable searches and seizures is one of the rights retained by prisoners subject, of course, to such curtailment as may be made necessary by the purposes of confinement and the requirements of security. Like all things there must be a point of beginning and in this area of evolving law, where its expansion must be tailored to the peculiarities of the prison environment, this case offers as such a point these guidelines for the censorship of mail, which in my opinion, satisfy the mandate of the Fourth Amendment as it may apply to a penal institution and are applicable for the purposes of this motion. I feel compelled to comment on the Fourth Amendment waiver signed by prisoners at the time of commitment. In exchange for mail "privileges" ACI officials require from each inmate his signature to a written statement authorizing them to censor his mail. It is this Court's view that such "authorization" under the inherently coercive circumstances under which it is given is without effect and cannot operate as a waiver or consent under the Fourth Amendment to the opening and reading of all of his mail.[9]

The suggestion seems eminently correct, since, at least for incoming mail, there would seem to be no obvious difficulty in obtaining a warrant, much like a wire-tap warrant, authorizing continuing scrutiny of the mail of certain inmates whom the administration has good reason to consider worthy of surveillance.

Nonetheless, the great weight of authority is contrary to the *Palmigiano* suggestion. In *Stroud v. United States*,[10] the Supreme Court upheld the right of prison officials to use as evidence in

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ment, to all the laws the legislature in its wisdom may enact. . . . For the time being, he is . . . the slave of the State.

8. 317 F. Supp. 776 (D.R.I. 1970).

9. *Id.* at 791-92.

10. 251 U.S. 15 (1919), *rehearing denied*, 251 U.S. 380 (1920).

later court proceedings admissions made by an inmate in letters found in his cell or passed on for mailing. Recently, the *Stroud* rule has been followed by the Ninth [11] and Tenth [12] Circuits. In the latter case, the inmate's correspondence to other inmates, which he gave to an "orderly" to transmit, was taken instead to the warden's office and read, and the evidence used against him in his trial for second degree murder. The federal court, in allowing the use of the evidence, declared that "The messages in question here came into the possession of the penitentiary officials under established practices reasonably designed to promote the discipline of the institution." [13]

The rulings in these latter cases have purported to find support in *Lanza v. New York*,[14] where the Court affirmed a contempt conviction when the defendant refused to answer questions put to him by a state legislative investigative committee. The defendant's chief contention was that the questions were based upon information gathered from a monitored conversation in the visiting room of a New York jail. From the fact that the Court did not overthrow the contempt citation, it is often argued that the Court *held* that conversations in jails were not constitutionally protected. But *Lanza* does not support the proposition suggested, for several reasons: (1) there was no majority opinion; (2) only seven Justices took part; (3) the plurality opinion carefully and specifically rested its decision on the fact that *some* of the questions posed did not derive from the conversation:

> [T]he record shows that the committee had other independent information which could have occasioned the petitioner's interrogation. In short, we conclude that the ultimate constitutional claim asserted in this case, whatever its merits, is simply not tendered by this record.[15]

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11. United States v. Wilson, 447 F.2d 1 (9th Cir. 1971).

12. Denson v. United States, 424 F.2d 329 (10th Cir. 1970).

13. *Id.* at 330-31. *See also* Cox v. Crouse, 376 F.2d 824 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967); Hayes v. United States, 367 F.2d 216 (10th Cir. 1966); *In re* Bull, 123 F. Supp. 389 (D. Nev. 1954); Green v. Maine, 113 F. Supp. 253 (D. Me. 1953); Baker v. State 202 So. 2d 563 (Fla. 1967); Ellis v. State, 227 Miss. 440, 86 So. 2d 330 (1956); State v. Johnson, 456 S.W.2d 1 (Mo. 1970) (dictum); Bloeth v. Cyrta, 39 Misc. 2d 1039, 242 N.Y. S.2d 307 (Suffolk County Ct. 1963).

14. 370 U.S. 139 (1962).

15. *Id.* at 147. Mr. Chief Justice Warren, in a separate opinion refused to be put off so easily, particularly in light of the controversy which the practice had stirred:

> The New York Appellate Division termed the action at the jail 'reprehensible and offensive,' *People* v. *Lanza*, 10 App. Div. 2d 315, 318, 199 N.Y.S.2d 598, 601;

Furthermore, several post-*Lanza* developments cast even greater doubt upon the assertion that inmates lose their rights against unreasonable searches and seizures of communications while in prison. In *Katz v. United States* [16] the Court spelled out the protections which the fourth amendment gave in terms of privacy, and rejected the old "constitutionally protected area" jargon which had formed the backdrop for many of the earlier cases. Although the Court did say that the fourth amendment "cannot be translated into a general constitutional 'right to privacy,'" it also made pellucid that prior concepts of lack of protection were not binding on the Court, under this new view. Thus, pre-*Katz* cases upholding monitoring of jail conversation against challenges of invasion of privacy would seem to be of dubious validity. In *People v. Morgan,*[17] for example, the court

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earlier the court had called it 'atrocious and inexcusable,' *Lanza* v. *New York State Joint Legislative Committee,* 3 App. Div. 2d 531, 533, 162 N.Y.S.2d 467, 470; also 'flagrant and unprecedented,' *Matter of Reuter,* 4 App. Div. 2d 252, 255, 164 N.Y.S.2d 534, 538. In the Court of Appeals it was characterized as a 'gross wrong,' *Lanza* v. *New York State Joint Legislative Committee,* 3 N.Y.2d 92, 101, 164 N.Y.S.2d 9, 16, 143 N.E.2d 772, 777 (dissenting opinion), and counsel for the Joint Committee made no effort to justify or excuse the action, but on the contrary himself called it 'repulsive and repugnant,' *ibid.* The Governor of New York termed unchecked eavesdropping 'unwholesome and dangerous,' McKinney's 1958 Session Laws of New York, 1837; and the Chairman of the New York Joint Legislative Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned [with] . . . efforts to protect the people's right of privacy." Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, 25. It has been reported that a New York trial court judge found it necessary to release a prisoner without bail so that he would be able to consult his attorney, the judge not being able to feel confident after this incident that there was any jail in the State where the prisoner and his lawyers could be secure against electronic eavesdropping. Comment, 27 Fordham L. Rev. 390, 394, n. 35. The most striking indication of the degree to which the people of the State of New York were shocked by the incident was the enactment of Article 73 of the Penal Law of New York, making it a *felony* to do what the officials in this case did. And finally the Appellate Division of the Supreme Court, affirmed by the New York Court of Appeals, reduced the bizarre and unprecedented sentence of ten years for contempt of court to one year.

Id. at 149-50.

16. 389 U.S. 347 (1968).

17. 197 Cal. App. 2d 90, 16 Cal. Rptr. 838 (4th Dist. 1962), *cert. denied,* 370 U.S. 965 (1962). In *Morgan,* the court explained its ruling this way: "A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in free society. His lack of privacy is a necessary adjunct to his imprisonment." *Id.* at 93, 16 Cal. Rptr. at 840. Even were that so, and the thesis of this article is that it is far less so than supposed, this would still not justify listening in on conversations which he should reason-

allowed the use of a conversation between defendant and his sister, tape recorded as they used the jail private intercom system, the only available means of communicating. The court relied on two theories: (1) electric eavesdropping without trespass was not prohibited by the fourth amendment; (2) since officials could censor or stop mail, any communication was subject to inspection, eavesdropping, and use. Both premises are now in serious doubt.[18] Nevertheless, the courts continue to admit such evidence,[19] one of the most recent examples being the use of such information against Susan Denise Atkins, one of the "Manson family" ultimately convicted in California.[20]

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able expect to be private. For other cases upholding use of similar information, see People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); People v. Ross, 236 Cal. App. 2d 364, 46 Cal. Rptr. 41 (2d Dist. 1965); People v. Stadnick, 207 Cal. App. 2d 767, 25 Cal. Rptr. 30 (2d Dist. 1962); People v. Hughes, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1st Dist. 1962).

18. *See supra* notes 2 and 15.

19. *See, e.g.,* People v. Apodaca, 252 Cal. App. 2d 698, 60 Cal. Rptr. 782 (2d Dist. 1967).

20. N.Y. Times, Oct. 10, 1970, at 12, col. 4. Nonetheless, the practice of using any information gathered in these situations against the prisoner in future trial proceedings has generated much heat. In People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), the California Supreme Court held admissible statements which an inmate made to a police agent placed in his cell as a deception. In People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (4th Dist. 1966), *cert. dismissed as improvidently granted,* 392 U.S. 616 (1968), however, the court chastised the police for this practice, calling it "indefensible," but finding that there was no indication of prejudice in connection with the particular information admitted at trial. Other courts, however, apparently agree with the *Lopez* case. *See* White v. Commonwealth, 301 Ky. 228, 191 S.W.2d 244 (1945); Commonwealth v. Goodwin, 186 Pa. 218, 40 A. 412 (1898).

The issue was posed to the Supreme Court in Miller v. California, 392 U.S. 616 (1968), but the Court dismissed the writ of certiorari as improvidently granted. Dissenting, Mr. Justice Marshall, joined by three other members of the Court, excoriated the practice:

> Fisk was not put in the cell to discuss the weather, to console petitioner, or merely to provide her with companionship. Her presence itself was an inducement to speak, and an inducement by a police agent. While petitioner's statements to her were not obtained by coercive means, they certainly were not given, in light of the deception, through a knowing and intelligent waiver of petitioner's rights.
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> Furthermore, it is clear on this record that Fisk was planted in petitioner's cell in order to subvert her right to counsel, with the express purpose of attempting to obtain evidence out of her mouth. On one occasion, Fisk was given a newspaper clipping concerning the case and was told to show it to petitioner, which she did with some accompanying statement, such as the press is 'ruining you.' On another occasion, pursuant to instructions, Fisk told petitioner of a conversation that she had supposedly overheard in a hall between four men whom she thought were from the district attorney's office, in which one of the men, as the ruse went, said: 'Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case.' Fisk also told petitioner 'I put all my trust

One of the most frequent of prison activities is the "shakedown" of an inmate, or of his cell. This unannounced search may prevent an escape plot, or turn up numbers of weapons which could have been used in serious violence. It may also uncover "contraband," variously defined in various prisons, but usually including cigarettes, certain books, unauthorized leaflets, tobacco, drugs, cash, and a multitude of other materials which prison officials believe indicative of an underlying inmate subculture of violence or immorality. Tobacco, for example, is clearly the currency of most prison societies, and many cigarettes may have been obtained as payment for regulation-breaking acts.

Thus far, no reported cases have dealt with direct challenges to either cell searches or body searches.[21] Several cases attempt-

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in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same.' Finally, Fisk said that she had at one time been represented by an attorney who 'did not do me much good' and indicated that perhaps petitioner should suspect hers.

Such deliberate police deception and subversion of a defendant's rights should not be condoned. The District Court of Appeal said in this case:

> It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. . . .
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> . . . . . .
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> The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible . . . . (245 Cal. App. 2d, at 141, 143-144, 53 Cal. Rptr., at 738, 740.)

Id. at 626-27.

The plurality opinion in United States v. White, 401 U.S. 745 (1971), reaffirming the *On Lee* (On Lee v. United States, 343 U.S. 747 (1952)) and *Hoffa* (Hoffa v. United States, 385 U.S. 293 (1966)) rules that conversations with "decoys," whether monitored or unmonitored, are admissible because no reasonable expectation of privacy exists, may serve to differentiate the "decoy" cases from the *Lanza*-type case. However, it is hard to understand why the defendant has a reasonable expectation of privacy in *Katz* when the conversation is disclosed by a third party, but doesn't have a reasonable expectation when the other party to the conversation ultimately determines to "spill the beans." Nor did the Court's opinion in *White* clarify that point. The issue is further confused by the fact that the discussion of the viability of *On Lee* is dictum, since a majority of the Court agreed only that defendant's conversation was not subject to *Katz* standards, the conversation having occurred before the announcement of that decision. *Cf.* Desist v. United States, 394 U.S. 244 (1969).

21. In Burns v. Wilkinson, 333 F.Supp. 94 (W.D. Mo. 1971), the court dealt peremptorily and rather disingenously with the prisoner's complaint seeking an injunction against later cell searches, based on his assertion that his fourth amendment rights had been violated. While purporting to recognize that the fourth amendment followed a prisoner into the institution, the court cited two cases dealing with parolees, Brown v. Kearney, 355 F.2d 199 (5th Cir. 1966) and United States v. Hollman, 365 F.2d 289 (3d Cir. 1966), and then cited the *Palmigiano* case. In thereafter holding that no cause of

action was stated by the complaint, the court cited Lanza v. New York, 370 U.S. 139 (1962), discussed *supra* notes 14-15 and accompanying text, which was not based upon constitutional rights, and United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970), which held that evidence seized in violation of a parolee's fourth amendment rights could nevertheless be admitted at his revocation hearing. Thus, if the court *did* recognize fourth amendment protection in prison, its precise scope certainly was not articulated in the opinion, and the citations relied upon, having no bearing at all upon the case, are similarly unilluminating.

In one case, however, the court effectively granted some relief, although not specifically requested by the plaintiffs. In McCray v. State, No. 4363 (Md. Cir. Ct., Montgomery County, Nov. 11, 1961), the plaintiffs complained of brutality. Although finding no record evidence to support this claim, the court ordered the adoption of rules concerning searches of both cells and bodies. These rules are reproduced verbatim here:

VIII. *SEARCHES:*

1. Searches of Patients

All searches of patients by correctional officers shall be conducted with maximum respect and minimum physical discomfort to the patient. In cases of patient non-cooperation or resistance to a search, the officer shall contact his superior immediately for instructions; the officer shall not attempt to use force on his own. Only items which are prohibited by the Patient Conduct Rules or the regulations of the tier to which the patient is assigned shall be confiscated.

2. Searches of Cells

All searches of cells shall be conducted with minimum disturbance to the contents of the cell. The officer(s) conducting the search shall return all items moved during the course of the search to their places and shall take all reasonable precautions to avoid damage to any items. Only items which are prohibited by the Patient Conduct Rules or by the regulations of the tier to which the patient is assigned shall be confiscated. The patient shall be present during a search of his cell and shall be given a written list of all items which are confiscated.

3. Strip Searches

Except as provided by Disciplinary Segregation and Administrative Segregation procedures, strip searches shall be conducted only upon the written certification of the Associate Director for Custody that there is probable cause to believe that a strip search of named patients is absolutely necessary to ensure the order of the institution or the safety of patients or staff.

Strip searches shall be conducted with maximum courtesy, maximum respect for the patient's dignity, and minimum physical discomfort to the patient. In cases of patient non-cooperation or resistance, the officer shall immediately contact the Associate Director for Custody, or in his absence that person acting in his place, for instructions; until he receives such instructions, the officer shall not attempt to effect a search by force. Only items which are prohibited by the Patient Conduct Rules or the regulations of the tier to which the patient is assigned shall be confiscated.

4. Alleged Discovery of Contraband

If a patient is accused of possession of contraband, the prior notice to him required by Rule 3A of the Disciplinary Hearing Procedures shall include a complete list of the items allegedly found on his person or in his cell.

The only case in which a rectal search was challenged in any way is Konigsberg v. Ciccone, 285 F. Supp. 585, 593 (W.D. Mo. 1968), in which Konigsberg, having been involved in a scuffle in the yard, was subjected to a search, for no apparent reason. He refused to voluntarily submit to the search, because there was no medical personnel present. The court rejected the contention that he could not be forced to submit to such a procedure on the ground that the prison personnel did not actually touch him, but merely compelled him to bend over long enough and far enough to allow a visual inspection.

ing to recover personal belongings lost in cell searches *have* been filed; all have lost.[22] A recent case which offers some hope here is *Katzoff v. McGinnis,*[23] in which the district court ordered restored Katzoff's fifty days of good time lost because a diary which had been uncovered during a cell search referred to the warden as a "cigar smoking SOB." Truth being no defense, the inmate had been deprived of his good time, and thrown into a solitary confinement cell. Another, similar case, *Rodriguez v. McGinnis,*[24] involved the discovery in the inmate's cell of several "pornographic" pictures of his wife. Again, good time was assessed; again, the court held that the procedure by which it had been removed violated due process.

The upshot of all these cases is that the prisoner has very little, if any fourth amendment privacy protection as the law now stands. Property or information, seized from his mail (*Stroud*), cell (*Urbano*) or his person, or from the person of others (*Lanza*) may be confiscated and retained, or even used against them at a later proceeding, whether disciplinary or criminal. These cases completely lack any attempted justification. While the *Lanza* court did suggest that because surveillance "has been the order of the day" [25] in jails, it was acceptable, that watery kind of reasoning simply cannot withstand scrutiny.[26] The question, then, is

22. Urbano v. Calissi, 384 F.2d 909 (3d Cir. 1969); Gray v. Creamer, 329 F. Supp. 418 (W.D. Pa. 1971). The Fourth Circuit seems to have put an insuperable barrier in the path of those seeking return of items taken from cells or compensation for the items, rejecting the argument that these are "liberty" cases, and requiring instead that the plaintiffs meet the $10,000 minimum statutory amount under 28 U.S.C. sections 1331 or 1332. *See* Weddle v. Director, 436 F.2d 342 (4th Cir. 1970).

23. 441 F.2d 558 (2d Cir. 1971), *rev'd per curiam,* No. 35253 (2d Cir., Jan. 25, 1972).

24. 307 F. Supp. 627 (N.D.N.Y. 1969), *aff'd,* No. 35300 (2d Cir., Jan. 25, 1972).

25. 370 U.S. 139, 143 (1962).

26. The proposition that a prisoner has less privacy because everyone knows that there is less privacy in jail, and therefore he has no reasonable expectation of privacy is one of the most outrageous examples of tautological thinking espoused in many years. Nevertheless, some courts have accepted the idea, almost without any indication of thought at all. Perhaps the most incredible case is People v. Califano, 5 Cal. App. 2d 476, 85 Cal. Rptr. 292 (2d Dist. 1970), where the court allowed the use of a tape recording of a conversation between two codefendants, which occurred in the jail's "interview room," because the defendant, at the start of the conversation, had said to his companion, "The cops are probably listening right now," after which there had been raucous laughter on the part of the two. This, the court said, demonstrated that there was no expectation of privacy on the part of the defendants. The court ignored the fact, of course, that the two then proceeded to talk about their crime. The perversity of the idea that the police could wiretap anyone's phone and use any information gathered thereon simply by telling him that his phone was tapped, or even better, simply by announcing in the paper that many phones in a given area were tapped, is apparent.

what arguments can be raised in support of the current status of the law.

Several reasons suggest themselves: First, it may be argued, there *is* probable cause for any search, at any time, of any inmate's possessions. The mere fact that he is in prison, it could be argued, lends some credence to the fear that he may be in the process of breaking yet another law, or another regulation of the prison. Moreover, if his crime has been a violent one, he is in a community where others have been officially deprived of any right to defend themselves; therefore, we should be extra cautious because, in contrast to the "free world," the right of self-defense *may* be meaningless, or at least diluted, in the prison world. Finally, the security of the prison, as well as his own security, demands that there be some opportunity to "spot-search" him, for weapons, contraband, or any other material deemed contrary to prison safety.

The first position, obviously, cannot be accepted, for its acceptance would readily lead to the next proposition—that ex-convicts, having once been found guilty of a crime, are more likely to commit offences than others [27] and, therefore, should have less protection than others from searches and seizures conducted by the proper authority.[28] Additionally, in terms of violent offenders, the figures belie the premise—most inmates are *not* convicted of violent crimes.[29] It is simply not provable that

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Yet the California court has accepted it on more than one occasion. *See also* People v. Blair, 2 Cal. App. 3d 249, 82 Cal. Rptr. 673 (4th Dist. 1969). Surely the *Katz* case cannot be so easily evaded; surely it means that wherever one would reasonably expect privacy, he must be accorded privacy there, and cannot be deprived of that reasonable desire for privacy simply because he is told that it is not private. That is to say, there is some privacy the police *cannot* take away, at least without a warrant, no matter how explicit the notice of non-privacy.

27. Figures on recidivism rates vary greatly, but everyone is agreed that, as President Nixon has declared, the system "presents a convincing case of failure," Memorandum of the President of the United States to the Attorney General of the United States, November 13, 1969, and that at least one-half and possibly as many as three-fourths of those incarcerated will be re-incarcerated. Thus, a convincing case could be made, on a statistical basis, that those in prison, or those released from prison, are highly likely to return to a career of crime. Yet, obviously, there would be no basis whatsoever for taking away from these men their clear civil liberties as persons who have "paid their debt" to society, although courts continue to uphold civil disabilities on ex-felons. *See, e.g.,* Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968); Note, 53 VA. L. REV. 403 (1967).

28. *See* von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 BUFFALO L. REV. 717 (1972).

29. This varies greatly, of course, within prison systems. In those which use proba-

such a great percentage of inmates has been convicted of violent crimes that violence is to be more expected simply by that fact. Finally, even when the search is for weapons, one would at least expect that the fourth amendment test of *Terry v. Ohio* [30] would give guards sufficient basis for stopping any truly dangerous inmate and searching him. But if the search is for non-dangerous contraband, there would seem to be no reason that the officials could not obtain at least some sort of administrative warrant before searching each inmate's personal belongings.

In their contention that the "prison atmosphere" creates a different environment for fourth amendment rights, correctional authorities may be somewhat justified. Here, several arguments are open to them, supported in part at least by precedent and reason. First, it may be suggested, the searches conducted here are "administrative" searches, much like those approved in *Camara v. Municipal Court,*[31] and *See v. City of Seattle.*[32]

In those two cases, of course, the Court balanced the need of

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tion very heavily, it is possible that the prison population is more violence-prone, or at least has been connected with violent offences in the past. A study in California, for example, has recently concluded that while 44.2% of the newly admitted inmates in that state's prison had been convicted of homicide, robbery, assault, rape, or sex crimes in 1960, by 1968 the figure had risen to 53.8%. This, however, did not indicate that all of these crimes were violent. REPORT OF THE SELECT COMMITTEE ON THE ADMINISTRATION OF JUSTICE, PAROLE BOARD REFORM IN CALIFORNIA, ORDER OUT OF CHAOS 2-3 (1970). Moreover, the report also concluded that "if a measure of change in the characteristics of prisoners is their probable success after release, the population received as new prison input has *not* changed over the years. By this measure, the average inmate received today is no better or no worse than the average inmate received in 1960." *Id.* at 23. A study of Ohio's total inmate population in 1970, prepared by the Bureau of Statistics of the Department of Mental Hygiene and Correction, showed that of a total inmate population of 9,605, 4,205 (43% had been convicted of murder or manslaughter, rape robbery (both armed and unarmed) and aggravated assault. *Id.* at 1. Again, these figures are ambiguous, since many unarmed robberies, at least, may be nonviolent, while even embezzlement and fraud, for example, might be, in some instances, connected with violence. Nevertheless, the figures indicate some general conclusions about the inmate populations. A purported breakdown of these demonstrates that only one-third of new commitments to the Ohio System were convicted of violence offences. *See* DEPARTMENT OF CORRECTIONS AND MENTAL HYGIENE, OHIO'S ADULT CORRECTIONAL SYSTEM, THE REPORT IN BRIEF 2 (1970). Furthermore, since all agree that murderers, etc., are probably least likely to recidivate (in the California study, 71% of released murderers had no new arrests for any offense or misdemeanor, while only 13% of drug offenders were so listed), it is highly likely that many of the 1100 murder and manslaughter offenders could be reasonably classified as "nonviolent," at least in terms of the likihood that they will again resort to violence. *But see* Bunker, *War Behind the Walls,* HARPER'S MAGAZINE, Feb. 1972, at 39.

30. 392 U.S. 1 (1968).

31. 387 U.S. 523 (1967).

32. 387 U.S. 541 (1967).

the municipality to investigate housing and health code violations with the individual's right to privacy, and reached a compromise position, which differentiated between homes (where a warrant to search would be issued, generally, only upon a refusal by the owner) and businesses (where, the Court intimated, a warrant could be issued to cover an area, without the necessity of first requesting permission to search without a warrant). Although this "watered down" the fourth amendment protection in one view, it also gave more protection than the Court had previously allowed, in *Frank v. Maryland*.[33] The Court stressed that in either instance, an agency's decision to inspect need not be based upon knowledge of conditions in a specific home,[34] and that "surprise" might be a "crucial aspect of routine inspections." [35] Furthermore, the Court indicated that the mere passage of a certain period of time might itself be sufficient to justify the issuance of administrative search warrants.[36] It would seem, therefore, that application of the *Camara-See* doctrines to prison might allow a prison to obtain a standing, continuous kind of search warrant, allowing one search, for example, every X number of days, and that further searches could be justified on some of the bases laid out in those cases.[37]

Second, the argument may be made that the possibility of

33. 359 U.S. 360 (1959).

34. Camara v. Municipal Court, 387 U.S. 523, 536 (1967).

35. See v. City of Seattle, 387 U.S. 541, 545 n.6 (1967).

36. Camara v. Municipal Court, 387 U.S. 523, 538-39 (1967).

37. The "home visit" case, Wyman v. James, 400 U.S. 309 (1971), is of dubious applicability to the jail search situation, assuming, as this article suggests should be the case, that the fourth amendment applies to such searches. Mr. Justice Blackmun, for the Court, went out of his way to stress, again and again, that there was no intent in the home visit to find anything which might result in criminal prosecution: "the beneficiary's denial of permission is not a criminal act," *id.* at 317; "forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden," *id.* at 321; "nothing supports an inference that the desired home visit had as its purpose the obtaining of information as to criminal activity," *id.* at 321; "The visit is not one by police or uniformed authority . . . . It does not deal with crime or with the actual or suspected perpetrators of crime." *Id.* at 322; "The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding," *id.* at 323; [*Camara* and *See*, which are distinguished in the opinion] "each concerned a true search for violations." *Id.* at 325. Furthermore, the opinion clearly and unequivocally expressed no opinion on whether any evidence found during a "home visit" could be used against the victim of the visit in any way. *Id.* at 323. The only caveat might be the emphasis on the "rehabilitative" nature of the entire welfare program, but this is probably insufficient to see his opinion as endorsing jail searches, if they are otherwise protected by the fourth amendment.

violence, whether from one individual or a group, is always present in a prison, that it is impossible to determine which inmates are more likely to be contributors to the violence and, therefore, the situation is somewhat like a continuing "emergency," in which fourth amendment rights must be temporarily suspended.[38]

And these worries are justified. The alleged use of a wig by George Jackson to smuggle in a gun,[39] the use of a false phallus, which could spray bullets,[40] and the periodic inmate fights which result in serious injury or death all appear to sustain the state's burden here that the prison is an unsafe place—a place in which both guards and inmates often fear for their own lives—which calls for total abandonment of the niceties of the fourth amendment.

These arguments are alluring. But they fall short of justifying the continued degradation they invite upon inmates. In the first place, even administrative searches require some outside authorization; [41] wardens seek to keep the power to determine the frequency and breadth of such searches. Second, it may well be suggested by police that at least some areas in the "free world" pose as much constant danger as the prison. Third, the argument fails to consider other means by which much of the tension in correctional institutions can be lessened, such as classification, separation, and even isolation, into segregated sections of the same institution or, more desirably, into different institutions.[42] This

38. *See, e.g.,* Chambers v. Maroney, 399 U.S. 42 (1970); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966).

39. The allegations in the *Jackson* case are still fuzzy. For a short, but lucid synopsis of the case, see the Earl Caldwell story in the New York Times, Sept. 20, 1971, at 1 cols. 3-5.

40. *See* United States v. Roche, 443 F.2d 98 (10th Cir. 1971).

41. Camara v. Municipal Court, 387 U.S. 523 (1967); *cf.* See v. City of Seattle, 387 U.S. 541 (1967).

42. Perhaps, we must cease talking about "the" prison, and "the" prisoners, and begin a more careful analysis. For prisons and other correctional institutions are divided into several classes of "security," and prisoners are sent to these different institutions dependent upon several factors, including potential for rehabilitation, program availability, psychological factors, and the degree of danger which a classification committee believes they will pose for the other inmates and for the institution at large. Perhaps, then, we should at least consider whether different regulations, indeed, different constitutional standards, might not apply, at least in the terms we have been dealing with, in these allegedly different grades of institutions.

Mail inspection provides a good example. The purpose of the inspection, we have already determined, is to protect the inmates and the institutional staff from violence and, as well, to prohibit contraband, at least that contraband which carries a distinct potential for unrest, such as drugs, money, etc. In a maximum security institution, where "escape" is theoretically filled with danger, and where inmates are not generally allowed access to any material which might be used as a weapon except under careful scrutiny, the argument for inspection of packages and cells becomes stronger. In a minimum,

is clearly in keeping with modern correctional thinking, and may well be the "less drastic alternative" [43] to impinging on the rights of all the inmates in an institution. The emergency analogy, while superficially scintillating, is simply that—superficial. Although there is undoubtedly *some* underlying tension in any correctional institution all the time, this could be said of many other places in our crowded urban life today.

Even if one were to accept these arguments, in part, as some justification for cell searches, however, they apply in little or no direct degree to searches of mail, searches of the body, and seizures of non-dangerous contraband, such as cigarettes, pornographic pictures, etc. Assuming the right of officials, within limits flexibly proscribed by the Constitution, to search cells, there is no justification for helter skelter searching of incoming mail. Furthermore, these justifications might apply with greater force if the authorities were to limit the use of the materials found in such searches to disciplinary measures.[44] But that is not the case. These pieces of information, as in the *Stroud* case or the decoy

no-wall institution, where escape means simply a casual walk, and where residents have ready access to hundreds of tools, etc., which *could* become weapons, search of packages, at least for weapons, becomes much less justifiable. This analysis closely parallels the outside world as well. One major reason we would not tolerate random inspection of packages that go through the post office, for weapons, drugs, or anything else, is that there are simply so many alternate routes by which one may come into possession of such items that the inspection would seem like a gratuitous invasion of privacy, with little hope of achieving any legitimate state end. In the prison, on the other hand, the main source of materials is mail and other outside communication; inspection here may well cut off much of the supply or illicit items, thereby actually achieving the state purpose.

43. The doctrine of the less drastic alternative requires that, before a state may infringe upon fundamental civil liberties and human rights, it must show not only that its regulation serves a *compelling* state interest, but, in addition, that there is no way to achieve that interest which infringes less upon those rights. *See, e.g.*, Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). The primary cases in the Supreme Court are Shapiro v. Thompson, 394 U.S. 618 (1969) and Sherbert v. Verner, 374 U.S. 398 (1963). The doctrine has already been applied to institutions, in Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969), where the court required that officials of a mental institution demonstrate that maximum security confinement was the "least drastic alternative" by which the process of treatment and incarceration could be obtained.

44. The issue of whether materials seized in an "administrative" search, where standards are less rigorous than for criminal matters, can be used in subsequent criminal proceedings is still not resolved, but in a leading decision, Piazzola v. Watkins, 316 F. Supp. 624 (M.D. Ala. 1970), Judge Johnson invalidated the use of marijuana found in a college dormitory in a criminal proceeding, although he had previously held in Moore v. Student Affairs Comm., 284 F. Supp. 725 (M.D. Ala. 1968) that the evidence could be used to expel the students. The *Piazzola* opinion was affirmed, 442 F.2d 284 (5th Cir. 1971). *See* Turner & Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759 (1972).

situations, may lead to further prosecutions, so that *even if* one were to accept the position of some courts that material seized in violation of constitutional rights may be used in civil proceedings but not in criminal proceedings, that would not be applicable here.

The main fallacy of the prison arguments, however, in my opinion, stems from another source completely: it fails to consider the rights of privacy and dignity which I believe are inherent in the constitutional protections of the ninth and fourth amendments. Before continuing our discussion, then, let us turn to this issue.

II. The Right to Dignity, Autonomy and Privacy: The Theory

Even if, as the Court said in *Katz v. United States*,[45] the fourth amendment does not create a constitutional "general standard of privacy," it now seems clear that the right exists somewhere in the Constitution. For purposes of this discussion, we will refer to its source as the ninth amendment.[46] Stemming from *Griswold v. Connecticut*,[47] and moving onward, the "right to

45. 389 U.S. 347 (1967).

46. I do not seek or desire to become mired in the discussion of whether the "right to privacy" comes from the ninth amendment, the word "liberty" in the due process clause of the fifth amendment, the "emanations" of the Bill of Rights, natural law, or natural obstinacy. That issue split the Court wide open in *Griswold*, and has been the subject of extensive discussion, both before and since that case, as the following cites demonstrate. I use the terms "ninth amendment" and "right of privacy" simply as shorthand method; there is no approbation contained in either. For these highly interesting, but somewhat esoteric debates, see Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212; Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wis. L. Rev. 979; Dunbar, *James Madison and the Ninth Amendment*, 42 Va. L. Rev. 627 (1956); Franklin, *Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government*, 40 Tul. L. Rev. 487 (1966); Gross, *The Concept of Privacy*, 42 N.Y.U.L. Rev. 34 (1967); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 149-55; Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 Ind. L.J. 309 (1936); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 Marq. L. Rev. 121 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L.J. 679 (1966); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U.L. Rev. 787 (1962); Rogge, *Unenumerated Rights*, 47 Calif. L. Rev. 787 (1959); *Symposium—Comments on the Griswold Case*, 64 Mich. L. Rev. 197 (1965); *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 56, 162-65 (1965); Comment, *Privacy After Griswold: Constitutional or Natural Right?*, 60 Nw. U.L. Rev. 813 (1966); Comment, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 Temple L.Q. 46 (1968); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 Wm. & Mary L. Rev. 101 (1966); Comment, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 Wis. L. Rev. 922.

47. 381 U.S. 479 (1965).

privacy" has given its protection to people who do not want to wear motorcycle helmets,[48] or do want to wear long hair,[49] who want to have an abortion,[50] but do not want to be sterilized,[51] and even to those who wish to see obscenity in their homes [52] or perform "abnormal sex acts" in toilet stalls not in their own homes.[53]

Griswold itself, of course, has been so widely discussed and debated [54] that it would simply retread old ground to rehearse the case in much depth here. Briefly, the Court in *Griswold* held, per Mr. Justice Douglas, that a Connecticut statute forbidding the use of contraceptives, or the giving of advice as to their use, was unconstitutional. The grounds of the majority opinion, however, were unclear, the Court stating that the Bill of Rights created a "penumbra" of unenumerated rights, one of which was a "zone of privacy," [55] which the Connecticut statute transgressed. The Court stressed that the case involved married plaintiffs and that marriage was "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." [56] Although Mr. Justice Douglas was ambiguous as to the source of this "right of privacy," Mr. Justice Goldberg had a ready suggestion: the ninth amendment, he said, pointed to rights which, although unenumerated in the first eight, were nevertheless there, one of which was the right of privacy protected by the Court in this case:

> I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.[57]

48. *See* notes 61-70, *infra* and accompanying text.
49. *See* notes 71-82, *infra* and accompanying text.
50. *See* notes 83-96, *infra* and accompanying text.
51. *See* Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971).
52. Stanley v. Georgia, 394 U.S. 557 (1969), *discussed in* text accompanying notes 102-04, *infra*.
53. *See* notes 97-100, *infra* and accompanying text.
54. *See* articles cited, *supra* note 46.
55. 381 U.S. at 484.
56. *Id.* at 486.
57. *Id.* at 492 (Goldberg, J., concurring).

In dissent, Mr. Justice Black, adopting his "clear meaning" analysis, argued that since the right of privacy, or whatever other name was given it, was not specified in the Constitution, it could be invaded, not only when there is a counterbalancing governmental interest, but at any time, simply because it was not "prohibited by some specific constitutional provision," [58] a position clearly at odds with the view of the majority [59]—and even of the concurrences [60]—that a substantial state interest had to be demonstrated to uphold the statute.

Since 1965, *Griswold* has been used as an opening bar in various kinds of cases, each suggesting a "right of privacy." One of the fullest and most notable of these lines is the "motorcycle helmets" cases. By 1968 most states [61] had passed legislation which required drivers of motorcycles to wear protective head gear. These statutes were challenged in a startling number of states, one of the primary arguments being that the legislation was aimed at requiring the individual to protect himself. This, the argument went, was violative of his right to decide his own life, and risk his own injury, and hence infringed on his right of privacy protected by *Griswold*.

The courts almost unanimously rejected the challenges,[62]

58. *Id.* at 510 (Black, J., dissenting).

59. See Mr. Justice Douglas' listing of earlier cases, dealing with what he clearly believed to be other kinds of "privacy" issues, at 381 U.S. 483-85, *citing, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (associational privacy); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (religious beliefs); Breard v. Alexandria, 341 U.S. 622 (1951) (right to be undisturbed by commercial solicitors); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (considering, but denying, right to be undisturbed by music and advertisements on public bus); Monroe v. Pape, 365 U.S. 167 (1961) (right to be free from humiliating search by police). All of these cases required, at the least, a balancing test, and, in light of later cases, would probably now require the state to show a "compelling state interest."

60. *E.g.*, Mr. Justice White's thesis that the state "bears a substantial burden of justification," 381 U.S. at 503.

61. *See* Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 nn.2-5 (1969).

62. State v. Also, 11 Ariz. App. 227, 463 P.2d 122 (1969); Penney v. North Little Rock, 248 Ark. 1158, 455 S.W.2d 132 (1970); Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970); State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970); Wichita v. White, 205 Kan. 408, 469 P.2d 287 (1970); Everhardt v. New Orleans, 253 La. 285, 217 So. 2d 400 (1968), *appeal dismissed and cert. denied*, 395 U.S. 212 (1969); State v. Edwards, 287 Minn. 83, 177 N.W.2d 40 (1970); State v. Cushman, 451 S.W.2d 17 (Mo. 1970); State v. Darrah, 446 S.W.2d 745 (Mo. 1969); State v. Krammes, 105 N.J. Super. 345, 252 A.2d 223 (1969); State v. Mele, 103 N.J. Super, 353, 247 A.2d 176 (1968); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (Sup. Ct. 1967); State v. Anderson, 3 N.C. App. 124, 164 S.E.2d 48 (1968), *aff'd*, 275 N.C. 168, 166 S.E.2d 49 (1969); State v. Odegaard, 165 N.W.2d 677 (N.D. 1969); State v. Craig, 19 Ohio App. 2d 29, 249 N.E.2d 75 (1969); Elliott v. Oklahoma City, 471 P.2d 944 (Okla. Crim. App. 1970); State v. Fetterly, 254 Ore. 47, 456 P.2d 996 (1969); Commonwealth v.

but most of these cases specifically refused to hold the "privacy" argument invalid, choosing rather to find a rational state purpose of protection of those who might be injured if a motorcycle went out of control when its driver was hit in the head by pebbles and rocks spun up by the tires of passing cars.[63]

At least two state courts, however, attacked the argument directly, and held that state legislatures have the power to pass statutes which make it criminal for persons not to protect themselves.[64] In both instances, the courts raised what has been called the "necessity" argument: [65] that highway deaths had risen so

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Arnold, 215 Pa. Super. 444, 258 A.2d 885 (1969); *Ex parte* Smith, 441 S.W.2d 544 (Tex. Crim. App. 1969); State *ex rel.* Colvin v. Lombardi, 104 R.I. 128, 241 A.2d 625 (1968); State v. Solomon, 260 A.2d 377 (Vt. 1969); Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377, *appeal dismissed,* 395 U.S. 709 (1969).

63. Some courts suggested another, alternate purpose of the legislation—to prevent injured motorcyclists from adding to overcongestion in the hospitals, and perhaps putting themselves, and their dependents, on the welfare rolls. *See, e.g.,* State *ex rel.* Colvin v. Lombardi, 104 R.I. 128, 241 A.2d 625 (1968); State v. Acker, 26 Utah 2d 104, 485 P.2d 1038 (1971); State v. Laitinen, 77 Wash. 2d 130, 459 P.2d 789 (1969).

64. State v. Eitel, 227 So. 2d 489 (Fla. 1969); State v. Lee, 51 Hawaii 516, 465 P.2d 573 (1970). The argument has been accepted in dictum in several cases: Commonwealth v. Howie, 534 Mass. 769, 238 N.E.2d 373 (1968); People v. Carmichael, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1968); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968); State v. Odegaard, 165 N.W.2d 677 (N.D. 1969); State *ex rel.* Colvin v. Lombardi, 104 R.I. 28, 241 A.2d 625 (1968); Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377, *appeal dismissed,* 395 U.S. 709 (1969).

65. Note, *supra* note 61, at 376-77 (1969). The "public necessity" and "public ward" arguments are not new, of course. The right of the state to limit, or ban, the sale of alcoholic beverages was dealt with in the License Cases, 46 U.S. (5 How.) 504 (1847). Although the basis of the decision was that the sale was intrastate, Mr. Justice Grier's language even then noted the right of the state to ban any article "which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime." *Id.* at 631. This theme rang through the "police power" cases of the nineteenth century. The most interesting discussion, perhaps, is found in Mugler v. Kansas, 123 U.S. 623 (1887), in which the Court reaffirmed the virtual hegemony over alcoholic beverages it had earlier noted, against challenges under the fourteenth amendment. Responding to the argument that "liberty" within the fourteenth amendment encompassed the right to do whatever one wished unless, and until, it "harmed" someone else, the Court said: "But by whom, or by what authority is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere. . . . Under our system that power is lodged with the legislative branch of the government." *Id.* at 660-61. The same "crime, pauperism and poverty" argument was made by the Washington Supreme Court in Territory v. Ah Lim, 1 Wash. 156, 24 P. 588 (1890), where the court, in words that could be transported whole to today's world, in upholding a law regulating the use of opium, including private use, declared: "Smoking opium . . . is an insidious and dangerous vice, a loathsome, disgusting and degrading habit, that is becoming dangerously common with the youth of the country, and . . . its usual concomitants are imbecility, pauperism, and crime." *Id.* at 590. The argument is incredibly broad, since it would mean that a legislature need simply declare a situation one of public necessity, and thereby protect itself from judicial reversal. The doctrine is also found in tort law. *See* W. PROSSER, LAW OF TORTS § 24, at 124-25 (4th ed. 1971), but is limited even there to

rapidly that the issue had become one of the "continued viability of society." [66] And the Florida Supreme Court went further:

> we ought to admit frankly that the purpose of the helmet is to preserve the life and health of the cyclist, and for some more divinely ordained and humanely explicable purpose than the service of the state.[67]

A few state courts rejected the entire notion that the state could legislatively force an individual to protect himself, and further found wanting the proposed state interests in such legislation. The Michigan Court of Appeals denounced the statute as leading to "unlimited paternalism" [68] specifically basing its decision on *Griswold*, the ninth amendment, and Justice Brandeis' concept of the "right to privacy" expressed both in his seminal article,[69] and his famous dissent in *Olmstead v. United States*.[70]

Another set of cases which has raised, debated, and by no means settled the impact of the "right of privacy" are the student hair cases. Here, as in the motorcycle instances, the courts are split, but the split is much more pronounced: The First,[71] Fifth,[72] (in part) Seventh,[73] and Eighth[74] Circuits have adopted the arguments of students that the ability to wear one's hair at any length is protected by the *Griswold* penumbra; the Fifth,[75] (in part) Sixth,[76] and Ninth[77] Circuits rejecting them. The District Courts in other circuits, and even in these, are still in disarray,[78]

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emergency situations, such as the destruction of a house to stop a raging fire, and clearly has no direct applicability on an ongoing crisis such as that of motorcycle accidents.

66. State v. Lee, 51 Hawaii 516, 521, 465 P.2d 573, 575-76 (1970).

67. State v. Eitel, 227 So. 2d 489, 490 (Fla. 1969).

68. American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 357, 158 N.W.2d 72, 75 (1968). *See also* People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); People v. Smallwood, 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (1967); State v. Betts, 21 Ohio Misc. 175, 252 N.E.2d 866 (1969). For a discussion of the cases on both sides, see 67 MICH. L. REV. 360 (1968); Note, *supra* note 61; Comment, The Validity of Motorcycle Helmet Legislation, 30 U. PITT. L. REV. 421 (1968).

69. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

70. 277 U.S. 438, 478-79 (1928).

71. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

72. Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970).

73. Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

74. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).

75. Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

76. Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

77. King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971).

78. Finding for the students: Berryman v. Hein, 329 F. Supp. 616 (D. Idaho 1971); Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971); Axtell v. LaPenna, 323 F. Supp. 1077

and the literature continues to pour out, most of it favorable to the claim of the students.[79]

The different approaches to the *Griswold* issue may be seen by these quotations from the First Circuit opinion in favor of the students, and from the Ninth Circuit decision against the students. In the view of the First Circuit:

> We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty.
>
> We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people. The debate

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(W.D. Pa. 1971); Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1971); Turley v. Adel Community School, 322 F. Supp. 402 (S.D. Iowa 1971); Lambert v. Marushi, 322 F. Supp. 326 (S.D.W. Va. 1971); Dawson v. Hillsborough County, Fla., School Bd., 322 F. Supp. 286 (M.D. Fla. 1971); Watson v. Thompson, 321 F. Supp. 394 (E.D. Tex. 1971); Karr v. Schmidt, 320 F. Supp. 728 (E.D. Tex. 1970); Lansdale v. Tyler Junior College, 318 F. Supp. 529 (E.D. Tex. 1970); Black v. Cothren, 316 F. Supp. 468 (D. Neb. 1970); Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970); Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970); Sims v. Colfax Community School Dist., 307 F. Supp. 485 (S.D. Iowa 1970); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969); Westley v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Calbillo v. San Jacinto Junior College, 305 F. Supp. 857 (S.D. Tex. 1969); Zachary v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967). In most of these cases the courts specifically found a "right of privacy," via *Griswold*, for the students. Holding against the students: Rumler v. Board of School Trustees, 327 F. Supp. 729 (D.S.C. 1971); Valdes v. Monroe County Bd. of Pub. Inst., 325 F. Supp. 572 (S.D. Fla. 1971); Hammonds v. Shannon, 323 F. Supp. 681 (W.D. Tex. 1971); Pound v. Holladay, 322 F. Supp. 1000 (D. Mo. 1971); Farrell v. Smith, 310 F. Supp. 732 (S.D. Me. 1970); Gere v. Stanley, 320 F. Supp. 852 (M.D. Pa. 1970); Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970); Southern v. Board of Trustees, 318 F. Supp. 355 (N.D. Tex. 1970); Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970); Whitsell v. Tampa Indep. School Dist., 316 F. Supp. 852 (N.D. Tex. 1970); Livingston v. Swanquist, 315 F. Supp. 1 (N.D. Ill. 1970); Corley v. Daunhauer, 312 F. Supp. 811 (E.D. Ark. 1970); Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970); Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Pa. 1970); Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970); Wood v. Alamo Heights Indep. School Dist., 308 F. Supp. 551 (W.D. Tex.), *aff'd*, 433 F.2d 355 (5th Cir. 1970); Stevenson v. Wheeler County Bd. of Educ., 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 425 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970); Brick v. Board of Educ., 305 F. Supp. 1316 (D. Colo. 1969); Giangreco v. Center School Dist., 313 F. Supp. 776 (W.D. Mo. 1969).

79. Just a sample of notes on student hair cases includes: 20 ALA. L REV. 104 (1967); 18 CLEV. ST. L. REV. 143 (1969); 84 HARV. L. REV. 1702 (1971); 55 IOWA L. REV. 707 (1970); 59 KY. L.J. 238 (1970); 70 OSGOODE HALL L.J. 293 (1969); 11 SANTA CLARA LAW. 92 (1970); 23 S. CAL. L. REV. 150 (1971); 4 VAL. U.L. REV. 400 (1970); 1971 WASH. U.L.Q. 89.

> concerning the First Amendment is illuminating. The specification of the right of assembly was deemed mere surplusage by some, on the grounds that the government had no more power to restrict assembly than it did to tell a man to wear a hat or when to get up in the morning. The response by Page of Virginia pointed out that even those "trivial" rights had been known to have been impaired —to the Colonists' consternation—but that the right of assembly ought to be specified since it was so basic to other rights. The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance. We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes.[80]

The Ninth Circuit, however, dismissed the *Griswold* claim virtually out of hand:

> Neither *Griswold* or [*sic*] cases akin to *Griswold* are appropriate here. The conduct to be regulated here is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others.[81]

Yet virtually all those courts which have denied relief to students, or affirmed expulsions because of their failure to follow school dress codes, have not simply dismissed the privacy claim; they have sought long and hard to find justifications for the regulations.[82].

A third area in which the *Griswold* "privacy" argument has been raised is abortion. Here, however, the proponents of the doctrine have been highly successful in having the basic premise adopted that a woman has a right to privacy and determination over her own body, even though some courts have thereafter determined the presence of a compelling state interest to override the individual interest. In *People v. Belous,*[83] for example, the court declared that:

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80. Richards v. Thurston, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

81. King v. Saddleback Junior College Dist., 445 F.2d 932, 937 (9th Cir. 1971). The court cited *Schmerber, Breithaupt* and *Raderman* v. *Kaine* for this proposition. *See* the discussion at note 105, *infra* and accompanying text.

82. This is particularly true in the Fifth Circuit, where the key issue has been whether the wearing of long hair has, in fact, created a school disturbance. While one may disagree with that test, it nevertheless recognizes that the state must justify its rules. *See* the cases cited, *supra* notes 71-78.

83. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied sub nom.* California v. Belous, 397 U.S. 915 (1970).

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex.[84]

The argument has been accepted in several cases ruling anti-abortion statutes unconstitutional, in Texas,[85] Georgia,[86] South Dakota,[87] Wisconsin,[88] the District of Columbia[89] and Illinois;[90] even the dissents in those cases,[91] or the majority opinions in cases finding that the state presented a compelling state interest in such legislation, have agreed that *Griswold* establishes a basic right to privacy.[92]

The exact nature of the right, and the precise basis for its establishment, have not been clearly articulated, although the Illinois court referred to the "woman's interest in privacy and in control over her body," [93] and the District of Columbia court considered that there was a clear issue of whether to "bear children." Contrary decisions have avoided this issue, by finding that the question is not "simply whether the pregnant woman has a fundamental right to be let alone in the control of her body processes . . . [but whether the state can] assign to the human organism in its early prenatal development as embryo and fetus a right to be 'born' unless the condition of pregnancy directly and proximately threatens the mother's life," [94] thus posing the question as one of protection of the fetus' life versus the mother's privacy right.

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84. *Id.* at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

85. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).

86. Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).

87. State v. Munson, No. 4481 (S.D. Cir. Ct., Pennington County, April 6, 1970).

88. Babbitz v. McCann, 312 F. Supp. 725 (E.D. Wis.), *appeal dismissed,* 400 U.S. 1 (1970).

89. United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd,* 400 U.S. 813 (1971).

90. Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971).

91. *See, e.g.,* the dissent in *id.* at 1393.

92. *See, e.g.,* Corkey v. Edwards, 322 F. Supp. 1248, 1251 (W.D.N.C. 1971) ("We also agree that whether or not to bear a child is ordinarily and up to a point within the zone of privacy of a woman and that she has the right to be let alone in making that determination."); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1222-23 (E.D. La. 1970).

93. Doe v. Scott, 321 F. Supp. 1385, 1390 (N.D. Ill. 1971).

94. Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217, 1224 (E.D. La. 1970).

The issue is currently in the Supreme Court,[95] and we may soon have some strong indications from that tribunal as to the scope of the *Griswold* privacy right. But, whether the Court finds a "compelling state interest" sufficient to outweigh the privacy interest of the woman, or whether it evades the issue by finding the Texas and Georgia statutes too vague,[96] or takes another path entirely, it is unlikely to erase the concept of privacy as established in *Griswold,* at least in these cases, which touch so closely upon conception, contraception, sex, and the family, the precise components of that case.

Several other cases should be mentioned in this brief survey of the *Griswold* progeny. Of some importance in discerning the impact of *Katz* and *Griswold* are the "toilet-spy" cases, in which police officers have cut holes in ceilings above stalls and surreptitiously viewed activities in stalls in restrooms open to the public, usually in an attempt to capture persons using the stalls for homosexual acts. Where the stalls have no doors,[97] or where the activities could otherwise be seen,[98] the courts have held that the view is a constitutional search; but where this is not true, the courts have found an invasion of privacy, and have suppressed the evidence thus obtained.[99] In explaining the reasoning behind invalidating the "view," and relying on *Griswold,* the Maryland Court of Appeals stressed the "privacy" nature of the toilet stall:

> We believe that a person who enters an enclosed stall in a public toilet, with the door closed behind him, is entitled, at least, to the

95. *Roe v. Wade* and *Doe v. Bolton* were argued before the Court on December 17, 1971. 40 U.S.L.W. 3300 (1971) carries excerpts from that argument.

96. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970); Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970). The Court took that path in the *Vuitch* case. *See* Vuitch v. United States, 400 U.S. 813 (1971).

97. People v. Heath, 266 Cal. App. 2d 754, 72 Cal. Rptr. 457 (1968); People v. Roberts, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); People v. Maldonado, 240 Cal. App. 2d 812, 50 Cal. Rptr. 45 (1966); Kirsch v. State, 10 Md. App. 565, 271 A.2d 770 (1970); State v. Kent, 29 Utah 2d 1, 432 P.2d 64 (1967); *cf.* Poore v. Ohio, 243 F. Supp. 777 (N.D. Ohio 1965).

98. Shaw v. Pitchess, 323 F. Supp. 784 (C.D. Cal. 1969); People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963); State v. Coyle, 181 So. 2d 671 (Fla. App. 1966).

99. Britt v. Superior Court, 58 Cal. 2d 469, 374 P.2d 817, 24 Cal. Rptr. 859 (1962); Bielicki v. Superior Court, 57 Cal. 2d 602, 374 P.2d 817, 21 Cal. Rptr. 849 (1962); Brown v. State, 3 Md. App. 90, 238 A.2d 147 (1968); State v. Bryant, 287 Minn. 208, 177 N.W.2d 800 (1970). Only one case has allowed the search where the stall has been closed, and the activities would have been hidden totally from the view of one either in the restroom proper, or the outside. Smayda v. United States, 352 F.2d 251 (9th Cir. 1965). The court relied heavily on the theory that there was no trespass, *cf.* Brown v. State, *supra,* a theory surely put in question since *Katz. Smayda* has been cited and purportedly followed, but each time in cases to which it did not directly apply. *See* cases cited, *supra* note 97.

> modicum of privacy its design affords, certainly to the extent that he will not be joined by an uninvited guest or spied upon by probing eyes in a head physically intruding into the area.[100]

Finally, two other constitutional decisions should be at least cited. In *Buchanan v. Batchelor,*[101] a three judge district court, following what it took to be the clear import of the *Griswold* privacy doctrine, struck down Texas' sodomy statute as overbroad, since it reached marital activities as well as those of other persons. And in *Stanley v. Georgia,*[102] the Supreme Court invalidated the search and seizure of allegedly obscene materials because the defendant had possessed the items in his own house, for his own use, and not for commercial distribution. Although relying heavily on first amendment cases,[103] the Court left little doubt that the "privacy" aspect of the case also played an important role in the decision.[104]

Finding a common theme in these diverse cases is an uncomfortable and difficult task. But surely the Ninth Circuit, in allowing schools to regulate hair length of students, was correct in saying that the simple phrase "right to privacy" does not sufficiently describe the underlying core,[105] at least if we restrict the concept of privacy to what it has generally encompassed. Rather, it seems to me, the "ninth amendment" rights we have seen the courts talk of here are composed of several important factors: privacy, dignity, and self-determination. Thus it is that, almost unnoticed, the Supreme Court has declared that the purpose of the fourth amendment is "to protect personal privacy *and* dignity against unwarranted intrusion by the State," [106] and the Illinois court has spoken of the "woman's interest in privacy *and* in control over her body," and has struck down an abortion law as a "gross intrusion on woman's privacy which [forces] her to bear an

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100. Brown v. State, 3 Md. App. 90, 94, 238 A.2d 147, 149 (1968).

101. 308 F. Supp. 733 (N.D. Tex. 1970), *vacated sub nom.*, Wade v. Buchanan, 401 U.S. 989 (1971). *See also* Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968).

102. 394 U.S. 557 (1969).

103. *Id.* at 564-68.

104. *Id.* at 565.

105. *See* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir. 1971).

106. Schmerber v. California, 384 U.S. 757, 767 (1966) (emphasis added). *See* Trop v. Dulles, 356 U.S. 86 (1958), where the Court declared that the test of cruel and inhuman punishment was "nothing less than the dignity of man." *Id.* at 100.

unwanted child," [107] speaking of two separate and distinct interests.

The wearing of hair, like the wearing of a motorcycle helmet, after all, is not a "private" matter, in the sense that it occurs in one's boudoir, and women are not complaining that they are being asked to have their abortions done in public view. These individuals are not concerned solely with their "privacy"; it is, rather, their "liberty," their "autonomy," which has been transgressed by these laws. The argument is straight from Mill—one has autonomy over himself until and unless he begins to infringe on the autonomy of other persons.[108]

Support for this approach can be found in Professor Bloustein's similar analysis of the tort law of invasion of privacy,[109] in which he concluded that, notwithstanding Dean Prosser's position that the right of privacy was really four separate rights,[110] all the cases could be reconciled on one principle: the right to dignity.

> The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. . . .
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> . . . .
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> I contend that the gist of the wrong . . . is not the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home, may be the occasion and the cause of distress and embarrassment but that is not what makes the acts of intrusion wrongful. They are wrongful because they are demeaning of individuality and they are such whether or not they cause emotional trauma.[111]

Although Professor Bloustein dealt briefly with privacy in "non-tort" cases, his writing occurred before *Griswold,* before the hair and motorcycle, and abortion cases, and hence he was unable to use these decisions to buttress his argument. But surely those

107. Doe v. Scott, 321 F. Supp. 1385, 1390-91 (N.D. Ill. 1971).
108. *See* Note, 1971 WIS. L. REV. 922.
109. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. REV. 962 (1964).
110. Prosser, *Privacy,* 48 CALIF. L. REV. 383 (1960).
111. Bloustein, *supra* note 109 at 973-74.

cases support the contention that the apparent de minimis nature of the matter overlooks the fact that at the core in all of these cases is the fundamental concept of *dignity* of the individual.

Thus, the right to "privacy" is really not that at all, or at least not that alone; the concept encompasses human autonomy and human dignity, and that dignity is the key to understanding both the tort and the constitutional aspects of the phrase. Certainly, this appears from the cases outlined above, in which humiliation and degradation have played a major role: it is not *only* that privacy has been invaded, but that activities intended and thought to be safe from the world have been unveiled. It is the resultant humiliation and degradation that is the essential. Suppose, for example, that the toilet doors had swung open to disclose that the stall was being used for gambling. The privacy invasion would be virtually the same; the door is swung open. Yet I suggest that the reaction of the courts, and of juries, would be different; the reason would be the lack of humiliation. Indeed, the plaintiff in such a case would be protected only to the extent that he could convince the jury that the viewer had no way of knowing that gambling was being conducted, and that it was fully possible that an act of a more private—for which read humiliating —nature was going on.

This is why no physical trespass is necessary in the tort field or, with the advent of *Katz,* in the fourth amendment area. Privacy—and humiliation—are not physical, but mental, entities: it is all inherent in the phrase "expectation" of privacy. Thus, whether the toilet door be open or closed, if the expectation is there, an invasion has occurred; the only question is whether the expectation was "reasonable." If not, in the tort field, the upshot would be, effectively, contributory negligence; in the criminal area, that the police activity was not "unreasonable."

This analysis places a slightly different slant on the issues posed here thus far. For if humiliation and degradation are the keys to whether a right of privacy exists—and they may be different for tort and constitutional purposes—then the mere fact that a search is not forbidden by the fourth amendment does not, ipso facto, mean that *all* searches are allowed by the ninth amendment. The cell search, for example, may, at times, fall within the purpose to be furthered by, and hence within the scope of, the fourth amendment. But it may be conducted in such a way as to

humiliate and degrade the prisoner, so that the ninth amendment privacy right has been violated. Suppose, for example, there is probable cause to believe that an inmate has some contraband in his cell. A warrantless search under these circumstances may or may not be justified, depending on the exigencies of the moment. But if, in the process of searching, the officers literally turn the cell upside down, breaking and destroying objects in their wake, I suggest that the ninth amendment privacy right—the "dignity" of the individual—has been transgressed. While the initial intrusion into his privacy was justified, under the fourth amendment, the second intrusion, upon his dignity and self-respect, was not; a constitutional violation has occurred. Thus, a search may violate both the fourth amendment, because of no probable cause, and raise the exclusionary remedy, and at the same time, without any more, also invade the ninth amendment privacy right, because of the invasion, without cause, of the realm of dignity of the individual.[112] A search may also, however, be perfectly proper within the fourth amendment, and still violate the ninth amendment. Or, in some circumstances, the search might violate the fourth amendment and still not violate the ninth, because carried on with proper respect for the individual, or because the individual suffers no loss of dignity. The two are complementary, but not inexorably linked.

This discovery makes it easier for me, at least, to explain why I find little difficulty in sustaining *inspection* of mail, at least in some institutions, but react violently against the *reading* of mail. The former involves very little infringement upon the person himself, either physically or mentally. It makes no attempt to know his private thoughts, or assess him psychologically. It is not, in short, mental cruelty of the kind Goffman describes: there is no apparent or clear humiliation. The latter, however, fails to pass under the fourth-ninth-amendment right-of-privacy penumbra, for it *does* involve inspection of the mind, it does invade personal activities and thoughts, without achieving much, if any, purpose.

This also makes the warrantless body search issue much

112. A good example might be Monroe v. Pape, 365 U.S. 167 (1961), where the police first invaded the plaintiff's home in the early hours of the morning and then forced him and his wife to stand naked while a prolonged and destructive search of the premises occurred.

clearer, for here, the humiliation factor is so high that no possible state interest could legitimatize it or make it valid, even in the most maximum of secure prisons. Clearly, the "ad hoc" body search, which often occurs in prisons, runs at loggerheads with the humiliation principle. One major caveat, however, must be uttered even here: In *Schmerber v. California,*[113] the Court held that the taking of blood samples by a physician from a conscious man being treated for injuries to prove the state's charge that he was intoxicated while driving violated neither the fifth nor the fourth amendment. The Court ruled the search reasonable in a five-four opinion by Mr. Justice Brennan because (a) "there was plainly probably cause to arrest and charge petitioner"; (b) the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the 'destruction of evidence' "[114] and (c) "the test chosen to measure petitioner's blood-alcohol level was a reasonable one . . . performed in a reasonable manner."[115]

The *Schmerber* case has been viewed as qualifying, if not overruling, the classic case of *Rochin v. California*[116] in which the Court struck down the use of two capsules of morphine obtained by a stomach pumping of the defendant, whom the arresting officer had seen take the capsules in an apparent attempt to destroy evidence. Closer inspection, however, will demonstrate that *Rochin* and *Schmerber* are different cases: (1) the evidence in *Rochin* would not have been destroyed, as in *Schmerber;* (2) force and violence were used in *Rochin,* while in *Schmerber* the defendant was being treated at the time his blood was withdrawn; (3) the Court in *Schmerber* relied upon *Breithaupt v. Abram,*[117] another blood sample case, which had focused on the fact that blood samples are taken every day from millions of

113. 384 U.S. 757 (1966).

114. The Supreme Court has itself viewed *Schmerber* as an "emergency" case. *See, e.g.,* Vale v. Louisiana, 399 U.S. 30, 35 (1970). It has also, however, been viewed as involving not "real" evidence. *See* Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218, 223 (1967), but that, of course, is a fifth, not a fourth amendment issue. Thus, the only Supreme Court case to cite *Schmerber* as a fourth amendment precedent has done so only on the emergency basis of the situation.

115. 384 U.S. at 771.

116. 342 U.S. 165 (1952).

117. 352 U.S. 432 (1957).

Americans.[118] Whatever the status of blood samples, however, the kind of body searches conducted by prison guards would seem to be invalid: (1) the evidence would not be destroyed if the guards sought a warrant; (2) there is no "treatment" occurring when the search is made; (3) examinations of the anus, under force, is not "so slight an intrusion as is involved in applying a blood test"[119] to be analogous. Furthermore, the kind of "dragnet" body search often conducted in prisons seems tremendously overbroad and, therefore, challengeable under *Davis v. Mississippi*,[120] where the Court found invalid Mississippi's fingerprinting of virtually every young black in the area surrounding that of the alleged crime. If even fingerprinting, which is clearly not as intense an invasion of the body as blood sampling, can become unconstitutional when applied without any standards, or any apparent reason, surely the normal body search of a prison guard must be similarly invalid.

A slightly more difficult problem is posed, however, when the kind of body search involved in *Sostre* or *Konigsberg* is at issue. Here, the application is not general, but quite specific. And, under the argument already articulated as to mail and package inspection and reading, the inmate has been "classified," albeit in a rather haphazard and probably unconstitutional way,[121] as a serious security risk. Nevertheless, under the standards laid out in *Breithaupt* and *Schmerber*, the search is probably invalid: (1) there is force, or implied force, applied in the search; (2) there is little or no probable cause in connection with any specific search; (3) examinations of the anus are not typical, everyday affairs in the lives of most Americans, even those who go to their doctors regularly.

Additionally, the "right to privacy" protected by the ninth amendment, or by the "penumbra" of the Bill of Rights, never discussed in *Schmerber, Rochin, Breithaupt,* or any other crimi-

118. *Id.* at 436.
119. *Id.* at 439.
120. 394 U.S. 721 (1969).
121. In Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970), the court held that classification procedures must meet due process standards, and required a hearing, plus evidence presented, plus a possibility of counsel, either legal or nonlegal, plus an opportunity to cross-examine in special instances. The court's holding is unique, but highly desirable, since classification changes carry with them changes in freedom and liberty, privileges, opportunities for work or study release, home furloughs, etc. It is, in short, a change in the entire environment, and should be safeguarded by due process protections.

nal opinion (unless, perhaps, *Katz* can be said to deal indirectly with the concept), intensifies the belief that the search is illegal: the grossness of the invasion of the body cavities far outweighs any possible benefit which the prison might derive from this particular search. For in *Breithaupt,* in *Rochin,* and in *Schmerber,* there was strong cause, if not more, to believe that this defendant, at this time, had committed a crime; there is no basis for such a belief when a defendant in administrative confinement returns from exercise in the yard, or when a prisoner returns from a visit. Whatever "probable cause" requires, and that, of course, is a world of many greys, it is not present here.

Thus, we return to our beginning: that the purpose of prison today seems virtually one of degradation by design. As Dr. Willard Gaylin has described today's "correctional institutions":

> For purposes of security it is essential that the population remain divided. To that end it is necessary that a sense of community be discouraged, that communication among prisoners be made difficult; that leaders, natural or potential, be isolated; that passivity be encouraged and assertiveness, which is too close to aggressiveness, be restricted even if it might be applied to positive ends; that self-confidence be eroded and self-doubts be engendered; that prejudices and biases which divide the community be encouraged or at least tolerated; that sources that feed pride be restricted, because pride is potential power; that lethargy be rewarded; that individuality be obliterated; that the spirit of man be broken in the service of obedience.[122]

This distortion of the role which prisons should play must be rejected: the purpose of the prison should be protection, security and rehabilitation; whatever its present practice it should not be an instrument of degradation and a perpetrator of dehumanization. When the balance between the interest of the state in protecting both inmates and institution and the interest of the individual (and the state) in retaining his human dignity is close, the weight must be swung in favor of the inmate, since breakdown of security is often exaggerated, while the deterioration of human pride and soul in prison is well-attested.[123] Moreover, by restoring the dignity of the inmate, we are likely to decrease the poten-

122. W. GAYLIN, IN THE SERVICE OF THEIR COUNTRY: WAR RESISTORS IN PRISON 330 (1971)..

123. *See* the discussion note 126, *infra,* concerning the burden of proof and persuasion in "fundamental liberties" cases.

tial security problem, while a decision in favor of security can only decrease the humanity of the resident.

The most difficult issue under this analysis is the cell search. Here, the invasion is not physical in the same sense as the body search; consequently the humiliation factor would seem to be less intense. On the other hand, a physical intrusion of sorts into the domain of the inmate has occurred, without any clear probable cause; the evidence sought, in most cases, is unlikely to be destroyed; and the danger, in most instances, is not immediate. Of course, each search, or mass search, as the case usually is, would have to be judged on its own merits; a warden who "senses" an impending riot and searches for weapons will probably be vindicated, under the "emergency," or "disappearing evidence" theory.[124]

Many cell block searches, however, are not conducted in any real attempt to thwart immediate danger. Indeed, most correctional officers will admit that, at least in maximum security institutions, many of the inmates have some kind of weapon at virtually all times. Thus, the usual "search" is neither for purposes of discovering weapons, or for preventing bloodshed; it is a "functional" search—it "keeps the inmates uncertain" and "on their toes." Recently in one institution I know, the warden conducted a mass search of cells every day for three weeks. The reason was not to find new weapons the men had concocted during the one day lapse, or to uncover new caches of cigarettes won in the gambling that previous night. The search had one purpose—to show the inmates who was boss in the prison.

That kind of search, it seems to me, is of dubious constitutional validity. More importantly, it is of dubious correctional efficiency and desirability. Inmates, like the guards and the wardens, understand the necessity of occasional searches; indeed, as we shall discuss in Part Three of this article, they sometimes desire a search. But daily searches go beyond protection of either the institution or the inmates, and the inmates know that—they begin to resent the "Man," who is obviously using his power just to use his power.

In summary, the right to privacy, protected by the fourth and ninth amendments, should apply in prison, and there are

124. *See* cases cited, *supra* note 38.

hints that it soon will be there. When it does arrive, the courts will be faced with at least three kinds of "searches": (1) inspection of packages and mail; (2) body searches conducted (a) at the whim of the guards; (b) before certain inmates are allowed to exercise or before any inmate is allowed to visit, and after he returns; (3) cell searches. The first seems defensible under the current fourth amendment law. The second is of dubious validity, and the "privacy and humiliation" factors of the "ninth amendment" right of privacy tips the balance against those kinds of searches without a specific warrant. The third poses the most difficult issue, and will have to be decided on a case by case basis. In determining the validity of the search, the court should pay particular attention to the manner in which the search was conducted, and the purported purpose of the search. The more raucous the search, and the more apparently intended for intimidation purposes, the more willing the court should be to strike it down.

III. The Right to Dignity: Tentative Applications in Prison

The basic premise of the argument made under this "penumbra" is that each human being has a *right* to his individuality and uniqueness, and that state actions which infringe upon this dignity and privacy [125] must be justified by a compelling state interest.[126] The question then posed, is whether specific restrictions on the right to dignity may be justified in terms of the goals and interests of the prison.

125. We speak here only of constitutional rights of privacy, not of the tort concept enunciated by Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and expounded at length since. *E.g.*, Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948); Green, *Right of Privacy*, 27 ILL. L. REV. 237 (1932); Lisle, *Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1931); Nizer, *Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), except to the extent that these cases reinforce the view that dignity and autonomy are inherent components of the right to privacy, which then becomes protected from governmental invasion by the ninth amendment. *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

126. It seems clear that the compelling state interest test applies. The Court in *Griswold* cited several cases, including NAACP v. Alabama, 377 U.S. 288 (1964), in which that basic test had been used. Mr. Justice Goldberg specifically declared the test to be applicable. 381 U.S. at 497 (1965). At least this much can clearly be said: all the courts have rejected the *Griswold* position taken by Mr. Justice Black that the state need prove nothing at all because the rights are not specfically enumerated. *See* cases cited and discussed, *supra* notes 61-63, 68, 71-78, 83-94, and accompanying text. Many of those cases either specifically or implicitly adopt the compelling state interest test; only a few reject the standard explicitly.

A. *The Hair Cases*[127]

Like students, inmates have had a great deal of difficulty establishing *any* right, of any kind, to determine their own appearance. The incredible difficulty which courts have had over this simple issue, and the fact that the controversies continue to inundate the courts[128] demonstrates, perhaps, that the Eighth Circuit correctly summarized the issue as not one of "purpose" of the institution, but rather of "ideology" and, even more base, authoritarianism:

> A recent law review has concluded, after summarizing the cases,
>
> > 'What is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction, and that school officials are often acting on the basis of personal distaste amplified by an overzealous belief in the need for regulations.' 84 Harv. L. Rev. 1702 at 1715 (1971).
>
> The connection between long hair and the immemorial problems of misdirected student activism and negativism . . . is difficult to see. No evidence has been presented that hair is the cause . . . . Accepting as true the testimony that in St. Charles, Missouri, the longer the student's hair, the lower his grade in mathematics, it does not lead me to believe that shortening the one will add to the other. Indeed, the very fact that such evidence is offered would seem to support the periodical's conclusion.[129]

Most of the suits by prisoners to strike down hair regulations have been unsuccessful,[130] the courts docilely accepting the prisons' arguments that this is interference with prison discipline[131]

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127. *See* cases cited, *supra* notes 71-82.

128. *Id.*

129. Bishop v. Colaw, 450 F.2d 1069, 1077 (8th Cir. 1971) (Aldrich, J., concurring).

130. Daugherty v. Reagan, 446 F.2d 75 (9th Cir. 1971) ("We have not reached the point where we second guess the state authorities on the length of prisoners' hair."); Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971); Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970); Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970); Ralls v. Wolfe, 321 F. Supp. 867 (D. Neb.), *aff'd*, 448 F.2d 778 (8th Cir. 1971).

131. Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970). In early prisoner cases, of all types, both state and federal courts refused even to consider complaints about activities in the prisons. This view, dubbed the "hands off" doctrine, was justified on innumerable grounds: the management of the prison was an executive function, and review would violate the separation of powers doctrine; prison authorities inherently had unreviewable discretion; there was no possible way to grant relief; the complaints were "unjusticiable"; the officials had sovereign immunity. When state prisoners sought relief in federal courts, these spectres were joined by the ghosts of federalism: abstention, exhaustion, and comity. The early history was reviewed and thoroughly criticized in Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). *See also* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110

or that short hair is necessary for identification of the prisoner,[132] or that health considerations lead to the regulations.[133] Although one court and one attorney general have determined that hair regulations do indeed infringe upon constitutional rights of privacy,[134] the clear weight of authority is the other way.

Amazingly, none of these opinions discuss, in any detail, the genesis of hair and clothing regulations in prison, merely acquiescing in the authorities' views that these are necessary for the maintenance of discipline and order. These regulations were begun over 150 years ago, however, with only one purpose in mind—the degradation and humiliation of the inmate:

> Humiliation was one of the objectives of early prison treatment. One reason for prison stripes was to degrade the prisoners. This form of garb was introduced in New York prisons in 1815. Prison inmates in some states were obliged to wear garish clothing of varying hues. In Massachusetts the clothing was half red and half blue for first offenders; second timers were red, yellow, and blue; and third termers a costume of yellow, black and blue. Conspicuous clothing makes escapes more difficult. The shaving of heads or of just one half was and is still used . . .[135]

This remains the general purpose of these regulations today: the uniformity reduces the inmate's individuality, makes him more malleable, and hence less volatile. But it also reduces his humanity, removes his uniqueness, and impinges on his dignity.

U. PA. L. REV. 985 (1962). But the law has changed drastically—so much so that the Supreme Court, in unequivocal language, abolished the need for state prisoners to exhaust any remedies before coming to federal court. Wilwording v. Swenson, 40 U.S.L.W. 3277 (U.S. 1971). For some comments on the demise of "hands off," see Gallington, *Prison Disciplinary Decisions*, 60 J. CRIM. L.C. & P.S. 152 (1969); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227 (1970); Mueller, *Punishment, Corrections, and the Law*, 45 NEB. L. REV. 58 (1966). *See* Vogelman, *Prison Restrictions—Prisoner Rights*, 59 J. CRIM. L.C. & P.S. 386 (1968).

132. Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971).

133. Brown v. Wainwright, 419 F.2d 1376 (5th Cir. 1970); Blake v. Pryse, 315 F. Supp. 625 (D. Me. 1970). *But see* Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971). Intriguingly, the school authorities have apparently stopped arguing that long hair on boys is a health menace, since girls are obviously allowed to wear their hair long. This embarrassing fact, of course, is not directly observable in prison, allowing prison officials to continue to voice such an argument. Of course, lice and bedbugs may indeed be present in abundance in prison. *See, e.g.*, Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Commonwealth *ex rel.* Bryant v. Hendrick, Nos. 353, 354 (Philadelphia County Ct. of C.P., Aug. 11, 1970), *aff'd*, 444 Pa. 83, 280 A.2d 110 (1971), but the solution would seem to be a good exterminator, not a good barber.

134. The Attorney General of Washington issued an opinion to that effect in 1971. *See* 50 N.C.C.D. Newsletter No. 4, at 10, col. 2 (Sept.-Oct. 1971).

135. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 351 (3d ed. 1959).

Recently, watching a disciplinary court proceeding where an inmate was given five days in solitary confinement (suspended) for refusing to have his hair cropped to virtual "Yul Brynner" length, I asked the captain of the prison security force why he felt it necessary to enforce such hair regulations. His answer was disarmingly candid and naïve: "You should have seen them 20 years ago," he said, "they were just like a military unit; all the same hair length, the same uniform. They marched up and down in the yard and really put on a show." That he was the commanding general in such a show did not specifically occur to the speaker, although his position was obvious, as was his discomfort with the movement away from rigid uniformity. The court in *Bishop v. Colaw* [136] would have been no less accurate had it been speaking of the captain of the guard who spoke to me that day.

That prisons can function without demeaning men by making them wear uniforms or by shearing their hair, seems eminently obvious, particularly since there are prisons which do not have such restrictions,[137] the most well-known being the Washington State Penitentiary, in Walla Walla, where inmates have virtually become co-managers of the prison with the warden, in a startling move toward innovative thinking.[138] The Walla Walla experiment is, of course, new and tenuous, but it seems to be working.

B. *Visits*

A visit to an inmate can be humiliating and degrading for both the inmate and his visitor. After waiting for long periods of time,[139] the visitor is sometimes searched, as is any material she or he brings with him for the inmate. The visitor is then virtually shoved into a cramped, crowded, noisy room, sometimes separated by a wire, or even glass, barrier, from the inmate. In most institutions, the entire meeting is watched carefully by a guard, who

136. 450 F.2d 1069 (8th Cir. 1971). *See* text accompanying *supra* note 129.

137. *See supra* note 134.

138. The experiment in self-determination at Walla Walla State Prison in Washington has set the correctional world on its feet, agog at the (so far successful) spectacle of inmates running their own lives, within "the system," handing out punishments, etc. There is no official description of the project yet, but the inmates have formed the resident government council, which has issued a 10-page news release and letter on the subject. *See* N.Y. Times, Oct. 18, 1971, at 24, col. 1. For a description of how one such attempt succeeded, only to fall apart with the departure of the innovating warden, see Murton, *Inmate Self-Government*, 6 U. SAN FRANCISCO L. REV. 87 (1971).

139. In May, 1970, waits were sometimes three hours long in the New York City system. N.Y. Times, May 26, 1970, at 30, cols. 1-4.

eavesdrops assiduously to every word of the conversation. The time of the visit is clocked meticulously, and the visitor escorted vigorously away from the inmate at the end of the allotted time.[140]

Moreover, the prisoner and his visitor may be precluded by prison regulation from seeing each other more than once, or perhaps twice, a month, for short periods of time. In 1971, the situation in Ohio, for example, was as follows:

> A second problem concerning visitation privileges related to the rule that no visitor may visit an inmate more than one or two (depending on the institution) times per month. This creates a serious problem for the many inmates who receive visits from only one person or who have only one person whose visits they really cherish. For example, suppose that the only person who visits Inmate 'X' at LOCI is Mrs. 'X'; that both very much look forward to her visits; and that Mrs. 'X' would visit at least once a week if permitted. Under the present rules, 'X' will see his wife only twice a month and he will receive no other visits.[141]

Moreover, most institutions in the country restrict those whom an inmate may see to certain persons (and limit even that number), who are investigated by the state or federal authorities, thus precluding a "chance" visit by a friend who happens to be in the area. Furthermore, it is frequently difficult for an inmate to change the names on his list, which is established when he arrives at the institution. Since he may be there several years, the list may become outdated, thus effectively barring him from receiving visits from anyone.

These types of restrictions and degradations stem from the nineteenth century concept that prisoners should be kept isolated from the outside community.[142] Indeed, many of the institutions still in use are built in the wilderness, perhaps hundreds of miles from the nearest large community,[143] thereby frustrating even

140. *See, e.g.*, H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 506-09 (3d ed. 1959).

141. Ohio Citizens' Task Force on Corrections, Final Report D19 (1971).

142. Whether this was due to a fear that the community would adversely affect the inmate's progress toward rehabilitation, or vice-versa, need not detain us here.

143. Attica, of course, springs readily to mind. In 1971, Ohio finished construction on a 30 million dollar facility, located in a remote corner of the state, prompting one federal judge in the state to remark: "the official policy of the State of Ohio is that the standards of punishment which prevailed in medieval times are to be followed in dealing with those convicted of crimes. Insofar as possible, they are to be removed to remote places, and confined in harsh and forbidding prisons. In constructing its newest prison facility, the State selected one of its most sparsely populated areas as a site, and a medieval French prison as the basic model for the building." Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio

the most dedicated of visitors, particularly discriminating against the poor.[144]

Rooted in the nineteenth century desire to degrade and dehumanize the inmates, these practices would be quaint reminders of that time and philosophy—if they were not still in force. But their very existence as we turn toward the twenty-first century is a blemish on the name of all that is commendable—or becoming commendable—in corrections. To expect rehabilitation of any kind from this kind of treatment is, of course, absurd. Yet it is clear that humanitarian visiting practices may be a major part of a rehabilitation effort. Consider, for example, this description of the visiting facilities at Chino state institution in California:

> Stepping over to a couple seated in chairs under a tree [a visitor] said:
>
> 'What do you think of the visiting privilege here at Chino?'
>
> 'Oh, I think they're wonderful,' the husband said, 'My wife hasn't missed a Sunday in nineteenth months and I really believe that has kept us together. She brings a fine lunch that she prepares herself . . .' .

1971). The Citizens' Task Force, *supra* note 141 at A2, before the prison was even in use, agreed: "The Lucasville institution is archaic, already obsolete, and recognized as a testimonial to the ignorance of corrections in the nineteenth century, of which it is an excellent example."

Late in 1971, Senator Birch Bayh introduced a bill which would subsidize the abolition of all prisons built in rural communities, endorsing the concept of community corrections. *See* S.2535, 117 CONG. REC. 14,453 (daily ed. Sept. 17, 1971).

144. N.Y. Times, Feb. 3, 1971, at 42, cols. 1-8:

> Inmates at Auburn can have visitors once a week from 9 A.M. to 3:30 P.M. But visitors who come considerable distances (New York City, about 300 miles away, is home to many of the prison's 1,550 inmates) may be given permission to visit on both Saturday and Sunday. For Mrs. Jackson, like most wives, the expense of visiting is so costly for them that months can go by between visits. She last saw her husband in September, before his transfer to Auburn, and doubts that she will be able to afford the trip again soon.
>
> I can tell you this as a fact. I used to travel, with my four children in tow, from Queens, by bus, subway and railroad to Ossining. When I had cab fare, we rode from the station to the prison, otherwise we five walked. Twice after making the trip all the way up there, we were refused a visit because we were not familiar with the rules requiring a special pass for an extra visit. I have seen this happen for many people and it is sad to see an older person, particularly, make the trip in vain.
>
> Many families go on welfare in order to survive. In the past, discretionary funds were available to enable a wife to visit her husband to keep the family together. At present, a flat sum is paid, and a visit, if one is to be made, must come out of daily expenses, which often means not eating.
>
> The only way I can afford to make the trip is by bus and not often then. I travel all night coming and going so that I won't have to pay for a room, but that means I can only be with my husband one day.

> 'Well, how does this differ from other places?'
>
> 'Oh, there's all the difference in the world. Here you don't have an armed guard on the wall looking down your neck. You don't have that hemmend-in feeling. Here you feel like a man, again.'
>
> 'I think it's wonderful too' the wife said. 'It used to take me fourteen hours to travel five hundred miles north to see him for just one short hour, then fourteen hours back again. You can't think of anything to say in one hour. I was half scared and we just sat and looked at each other across a counter.'[145]

Thus far, the courts have been unkind to those who seek to remove barriers to visitors, or to eliminate the myriad of indignities to which both inmates and visitors are subjected,[146] but perhaps the analysis offered here will alleviate some of that reluctance to bring correctional institutions into consonance with correctional thinking.

Much more difficult, as a practical matter, but a much more fertile field in terms of legal doctrine, is the explosive issue of conjugal visitation. Although conjugal visiting is virtually nonexistent in the United States, it is practiced in many countries. Columbus Hopper, in his superb study of the Mississippi program of conjugal visitation,[147] reports that, of sixty countries responding to a questionnaire, thirty-one allowed either conjugal visiting or home furlough. Of these, twelve allowed conjugal visiting in some form.

The programs in these countries vary widely. In Sweden, for example, both home furlough and in-prison visitation is allowed, and used widely. Conjugal visits are generally allowed once a month, and home furloughs are used frequently. In the Soviet Union, wives are brought to the prison for a period of several days, at government expense. Argentina's program has been praised by two distinguished penologists, as "perhaps the most dignified type

145. K. SCUDDER, PRISONERS ARE PEOPLE 159 (1952).

146. Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971); Almond v. Kent, 321 F. Supp. 1225 (W.D. Va. 1970) (dictum); *cf.* United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967) (visits to inmates on death row). One court, however, has indicated sensitiveness to the issue. In Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971), the court, while not deciding on this ground, noted that transfer of plaintiffs to an institution remote from both Philadelphia and Pittsburgh would restrict the opportunity of relatives to visit, and therefore imposed strict due process requirements on hearings before transfer.

147. C. HOPPER, SEX IN PRISON 5-6 (1969).

of conjugal visiting." [148] Columbia, Chile, and Puerto Rico also provide for conjugal visitation inside the prison.

India, Burma, the Philippines, and several others permit family colonies—a kind of perpetual conjugal visitation where the family of the prisoner lives with him in some residential area specially established for this kind of program. Undoubtedly the most famous of these is Mexico's Tres Marias Colony, located on a small island 90 miles off the nation's Pacific coast. The inmates are generally those who have long records of offenses, particularly violent offenses. A prisoner is given complete freedom on the island, and he may establish himself in any business which is viable.[149] Yet conjugal visiting has never been widely accepted, or even experimented with, in the United States. Aside from Mississippi's program,[150] the result of historical accident, and a few sporadic experiments in California [151] and elsewhere, the idea simply has not been well received.[152]

Some have suggested that this is a response to the image of sexual activity occurring in the prison,[153] but it would appear more likely to be simply another manifestation of the power which correctional officers exercise over the private lives of their charges, a power which allows them to require a probationer or parolee to obtain permission before being married,[154] or to for-

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148. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 511 (3d ed. 1959).

149. The program is traced in Jewell, *Mexico's Tres Marias Penal Colony*, 48 J. CRIM. L.C. & P.S. 410 (1958).

150. C. HOPPER, SEX IN PRISON (1969).

151. *See, e.g.*, N.Y. Times, Feb. 14, 1971, at 69, col. 1 (Soledad); N.Y. Times, Aug. 4, 1968, at 57, cols. 1-5 (Tehachapi). A report of the California Board of Corrections recently urged that conjugal visiting be extended to all its prisons. CALIFORNIA BOARD OF CORRECTIONS, INSTITUTIONS 41 (1971).

152. Bills favoring conjugal visiting have been introduced in Michigan, where one is still pending, and in Wisconsin, where the bill was killed in committee. 1 PRISONERS' RIGHTS NEWSLETTER 17-19 (Sept. 1971).

153. Conjugal visits in prisons are not compatible with mores of the United States, since they seem to emphasize only the physical satisfactions of sex. Home leaves and family residence in prison colonies place the emphasis on the whole complex of married life and family relationships—psychological and social as well as sexual. In the countries surveyed, much more so than in the United States, the trend is toward expansion of total family contacts.

Cavan & Zemans, *Marital Relationships of Prisoners in Twenty-Eight Countries*, 49 J. CRIM. L.C. & P.S. 133, 139 (1958).

154. State v. Black, 289 Minn. 508, 183 N.W.2d 774 (1971). Although reversing a lower court decision upholding revocation of probation for violation of a condition that required approval of probation officer before marriage, because there was no evidence that the

bid a husband and wife from seeing each other because they have both been connected with drugs.[155] In short, the continuation of this oppression, this infringement of the marital relationship, seems to stem not from an innate abhorrence of the idea that the prison would become, as many wardens like to put it, a "public whorehouse," but rather from the continuation of the status quo in which correctional officers and administrators simply feel their power.

Moreover, the suggestion that prisons might become whorehouses if conjugal visitation was allowed misses the essence of the program. By far the great preponderance of those who have been involved agree that, while sexual relations are important in the overall context, the really important aspect of such visitation is the ability of the couple to continue to work and think together:

> While most people who hear of conjugal visiting think of sexual release as the only function of the practice, those who participate in the program speak first of the freedom of visiting in private with their wives and of being able to talk intimately and frankly to them without fear of being heard by the prison authorities.

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probationer, who had obtained a marriage license, actually intended to *marry* before asking the officer's permission, the Supreme Court of Minnesota, in dictum, declared that:

> We decline to hold that a requirement that defendant secure approval of his probation agent before getting married offends public policy. We find this a reasonable condition which is directed not only at defendant's rehabilitation but at the protection of his prospective wife and children as well. It is enough to say that there may be situations where marriage compounds rather than resolves a probationer's problems. Until and unless he is economically and psychologically capable of supporting a family, it is proper to forbid his marriage, and in so doing he is denied no constitutional rights.

Id. at 509, 183 N.W.2d at 775.

In the District of Columbia, an inmate was denied the right to marry his girlfriend, although she was then pregnant with his child, and both families approved. He filed suit, Parman v. Montilla, Civ. No. 469-70 (D.D.C., filed Feb. 17, 1970). No decision has yet been rendered.

155. *In re* Peeler, 266 Cal. App. 2d 511, 72 Cal. Rptr. 254 (1968). Holding that a trial court may order a probationer not to associate with any *reputed* users of marijuana or other drugs during the probation period, even though this meant that she could not live with her husband, who was currently charged with several drug counts, the court in *Peeler,* declaring that it was deciding only the facts of this case, first noted that narcotics was one of the most serious problems facing the country and, secondly, that the separation would be even more severe if the court had sent the defendant to prison, rather than put her on probation.

The weakness in the reasoning, of course, is that the greater power does not always contain the lesser. The court must demonstrate some *reason* for sending people to prison, and, likewise, must show some *reason* for its incredible intrusion into the marriage contract. Although, admittedly, the court did discuss these problems at length, it failed to grasp sufficiently the impact of what it was doing. *See also* Akamine v. Murphy, 108 Cal. App. 294, 238 P.2d 606 (1st Dist. 1951).

> They emphasize the emotional satisfaction rather than the physical satisfaction. A man who had been out of prison for more than three years after serving a sentence for robbery and who appeared to be, in his words, 'over the hill as far as crime is concerned,' spoke with great appreciation in his voice about the conjugal visiting program:
>
> > It was the only thing I had to look forward to while I was in Parchman. Believe me, I never knew how much my wife meant to me until I went to prison. She visited me every visiting day. She would encourage me and tell me I could make it. I was really blue when I first went to Parchman. I'll never forget the first time my wife visited me. I cried like a baby. But that first visit really helped me. I felt like a different man. It was a comfort knowing I could be with my wife on visiting day. Truthfully, I don't think I could have made it without her help.[156]

Remarkably, only one reported challenge to the absence of conjugal visitation has been made since *Griswold,* and it was rejected out of hand, without any discussion at all.[157] In light of the fact that even the narrowest holding of *Griswold* provides the marital relationship with a constitutional sanctity it never had before, the paucity of challenges is intriguing. Perhaps it is because the likelihood of success, particularly if one focuses solely on the sexual outlet, is weak; but if the analysis of this paper is correct, and the ninth amendment grants to each individual the right to dignity and autonomy, subject only to the state's demonstrating a compelling state interest in removing his individuality and his relationships, it would seem that the state might have some difficulty, at least in some instances, in defending a total denial of all such visitation rights.

C. *Homosexual Rapes*

One final area of indignity in prison should be mentioned before this tentative exploration terminates: the right to be free from sexual assaults in the prison. For if there is anything more demeaning, more at odds with the dignity and privacy which this paper suggests should be the present, almost dominant, theme in prison, it must be to be a victim of a prison rape.

156. C. HOPPER, SEX IN PRISON 103-04 (1969).

157. Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971). Unsuccessful challenges have been based on the theory that the marriage contract has been abrogated by the state, *In re* Flowers, 292 F. Supp. 390 (E.D. Wis. 1968) and by a wife, claiming *her* marital rights have been infringed, Payne v. District of Columbia Commissioners, 253 F.2d 867 (D.C. Cir. 1958).

That homosexuality is rampant in our prisons is evident. Barnes and Teeters report a letter they received from Dr. Kinsey on the matter:

> I may indicate that we have never gathered histories from any male institution in which fewer than thirty-five per cent of the inmates were involved in homo-sexual relations while they were in the institution. We have never secured histories from any long-term institution in which fewer than sixty percent of the men were engaged in such activity and in one such institution we had over ninety per cent of the inmates admit such experience within the institution. Until prison authorities comprehend the magnitude of this problem, it is possible to be totally unrealistic in attempting to cope with it.[158]

The most thorough and thoughtful study of the problem thus far, conducted in the Philadelphia jail and van system in 1968, reached the following monstrous conclusions:

> We found that sexual assaults in the Philadelphia prison system are epidemic. As Superintendent Hendrick and three of the wardens admitted, virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates. Others, because of the threat of gang rape, seek protection by entering into a homosexual relationship with an individual tormentor. Only the tougher and more hardened young men, and those few so obviously frail that they are immediately locked up for their own protection, escape homosexual rape.
>
> After a young man has been raped, he is marked as a sexual victim for the duration of his confinement. This mark follows him from institution to institution. Many of these young men return to their communities ashamed, and full of hatred.
>
> A witness describes the ordeal of William McNichol, 24 years old and mentally disturbed:
>
> > That was June 11th, I was assigned to E Dorm. Right after the light went out I saw this colored male, Cheyenne —I think his last name is Boone. He went over and was talking to this kid and slapped him in the face with a belt. He was saying come on back with us and the kid kept saying I don't want to. After being slapped with the belt he walked back with Cheyenne and another colored fellow named Horse. They were walking him back into E Dorm. They were telling him to put his hand down and stop

158. H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 373 (3d ed. 1959).

crying so the guard will not know what is going on. I looked up a couple of times. They had the kid on the floor. About 12 fellows took turns with him. This went on for about two hours.

After this he came back to his bed and he was crying and he stated that 'They all took turns on me.' He laid there for about 20 minutes and Cheyenne came over to the kid's bed and pulled his pants down and got on top of him and raped him again. When he got done Horse did it again and then about four or five others got on him. While one of the guys was on him, raping him, Horse came over and said, 'Open your mouth and suck on this and don't bite it.' He then put his penis in his mouth and made him suck on it. The kid was hollering that he was gagging and Horse stated, 'you better not bite it or I will kick your teeth out.'

While they had this kid they also had a kid named William in another section in E Dorm. He had his pants off and he was bent over and they were taking turns on him. This was Horse, Cheyenne, and about seven other colored fellows. Two of the seven were brothers.

Horse came back and stated, 'Boy, I got two virgins in one night. Maybe I should make it three.' At this time he was standing over me. I stated, 'What are you looking at?' and he said 'We'll save him for tomorrow night.'

. . . .

During the 26th-month period, we found there had been 156 sexual assaults that could be documented and substantiated—through institutional records, polygraph examinations, or other corroboration. Seven of the assaults took place in the sheriff's van, 149 in the prisons. Of the sexual assaults, 82 consisted of buggery; 19 of fellatio; and 55 of attempts and coercive solicitations to commit sexual acts. There were assaults on at least 97 different victims by at least 176 different aggressors. With unidentified victims and aggressors, there were 109 different victims and 276 different aggressors.

For various reasons, these figures represent only the top of the iceberg.

Our investigators, as mentioned, interviewed only a twentieth of the inmates who passed through the prison system. We discovered 94 assaults—excluding those reported in institutional records. This suggests that if all 60,000 inmates had been interviewed, 20 times 94—or 1880—additional assaults would have come to light.[159]

159. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8, 9-11 (Dec. 1968).

In 1970, a lower court in Philadelphia, in holding the Holmesburg Jail unconstitutional, because it was unsafe, unsanitary, and unable to protect the bodies, lives, and dignity of the men incarcerated there, found the situation relatively unchanged:

> With respect to sexual assaults: In September, 1968, a Special Master reported that sexual assaults were epidemic in the prison. In the opinion of the Superintendent, the assaults have been 'substantially reduced.' (N.T. 101-03.) However, they remain prevalent. One witness, when he was confined in G. Block during June, 1970, (N.T. 326), saw 4 different prisoners homosexually raped, at least 2 of these rapes involving 2 persons raping 1 prisoner. (N.T. 328-34.) He saw assaults both by penetration of the rectum and of the mouth. (N.T. 335.) Generally, the assaults are on a new prisoner who is meek or weak. (N.T. 335.) In addition, this witness saw 4 or 5 consensual acts of sodomy. (N.T. 334.) Another witness, when confined in B Block from March to June, 1970, (N.T. 368), saw two prisoners sexually attacking a kid, while a third prisoner stood by. (N.T. 384.) Another witness, when confined in B Block in July, 1970, was asked by a prisoner to submit to sexual intercourse, and when he refused, was told 'some people were going to mess me up, and he said if I gave I would be protected.' (N.T. 399-400.) Another witness had advances made to him by his cell mate on B Block; upon his request he was promptly transferred to another cell. (N.T. 370.) A witness who was a prisoner on A Block saw 'a little fellow . . . quite timid' sexually attacked by 1 of a group of about 5 prisoners. (N.T. 455-56.) Such attacks occur during the day, when the cells are open, and at the far end of the cell block, which is not always patrolled by the guards. The victim is dragged into an open cell while a prisoner acts as a lookout. (N.T. 331-35; 457.) Without doubt many such assaults are not reported. (*Cf.* N.T. 457.)[160]

Why do sexual assaults continue at such a rapid pace, when all penologists know they are there, know that they occur all the time and, in fact, will often assert, at least in prison, that most inmate fighting stems from homosexual activities of one kind or another, either because some inmate does not wish to become a punk, or because a triangle has developed, and one of the participants takes it upon himself to eliminate the third party? How is it that this frightful, hideous assault on the person, not to mention the dignity, of the inmate, is allowed to continue?

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160. Commonwealth *ex rel.* Bryant v. Hendrick, Nos. 353, 354 (Philadelphia County Ct. C.P., Aug. 11, 1970), *aff'd*, 444 Pa. 83, 280 A.2d 110 (1971).

One answer is apathy and indifference:

> Many guards discouraged complaints by indicating that they did not want to be bothered. One victim screamed for over an hour while he was being gang-raped in his cell; the block guard ignored the screams and laughed at the victim when the rape was over. The inmates who reported this passed a polygraph examination. The guard who had been named refused to take the test.
>
> Then too, some guards put pressure on victims not to complain—such complaints, after all, would indicate that the guards were failing in their duty. We found many cases where victims, after filing complaints, had 'voluntarily' refused to prosecute, and a number of them told us that guards urged them to rely on prison discipline rather than to bring the facts out into the open. Very often, these guards asked the victim if he wanted his parents and friends to find out about his humiliation.
>
> Without prompting from the prison guards, many victims and their families wanted to avoid the shame and dishonor they believed would follow such a complaint.[161]

Another possible answer, accepted by at least one court,[162] is that keepers simply do not have the manpower, or the resources, to protect against all assaults, and therefore, unless it can be clearly shown that the keeper knew that the assailant was likely to assault this particular inmate, there is no recourse. The thought of that defense being accepted in a non-prison setting is an impossible one for me. The issue, however, is currently being litigated again, in another court, with essentially the same facts.[163]

Because of the difficulties involved in such proof, and the consequent inability to recover, other courts have viewed other possible remedies—such as transfer[164]—as more effective. Recently, the Missouri Supreme Court was faced with yet another issue: whether fear of a homosexual attack could be a defense to a charge of escape. The court, however, found that while the de-

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161. Davis, *supra* note 159, at 11-12. The casualness with which homosexuality is viewed by officials is reflected by the report of the Ohio Citizens' Task Force on Corrections, Final Report C72-73 (1971): that "[s]ome [inmates] called attention to their records of court calls for fighting as tangible evidence of their resistance to intimidation. Nearly all suggested that they were specifically instructed by staff and other inmates, a part of their unofficial orientation to institutional life, that they would either have to fight to protect themselves or submit to these indignities."

162. Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971). The same issues, of course, are also present in a "normal" assault, but these cases will not be discussed here.

163. Combs v. Kennedy, No. 70-C-285(2) (E.D. Mo., filed June 10, 1970).

164. Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

fense might be valid in some instances, there was no factual support for the defense in the present case.[165]

The issue of homosexuality in the prisons, the attempts to reduce its frequency, and the liability of the prison for the obvious infringements upon the person, dignity, and privacy of the victim, could be discussed at length; this brief glimpse at the issue was merely to suggest that it, too, might be dealt with as a branch of the "right to privacy and dignity" in prisons.

CONCLUSION

Our prisons are institutions which strive to dehumanize. That was their purpose in the nineteenth century and, with few exceptions, it continues to drive the prisons, their personnel, and their policies, in the last third of the twentieth century. We expose the inmate to indignities and invasions of privacy which, if they occurred in the "outside" world, would bring immediate howls of protest. Of course, there are legitimate security needs of the prisons, and these must be considered when weighing the prisoners' rights of integrity, autonomy, privacy. But our prisons are *not* meant for security: their chief purpose is, and should be, rehabilitation. It is impossible to rehabilitate a man when everything around him tells him, repeatedly, that he is not a man, that he has no humanity. It is not by chance that one of the chief complaints of the prisoner is that he is not "treated like a man."

This paper has dealt only with obvious and blatant assaults upon the dignity and autonomy of the people inside our correctional institutions. Perhaps that is a wrong focus, since the small harassments and hassles, such as hourly bed checks, with flashlights in the face, or batons across the bars, or a lost pass, or a "missed" phone call, can be every bit as demeaning, and dehumanizing, as the larger ones. But those "incidents" may fall along with the large abuses; if they survive, however, it may take, quite simply but quite impossibly, a new breed of prison personnel. This paper, at any rate, is simply an exploratory essay, suggesting at least one possible approach—the *Griswold* privacy approach—to the issue.

165. State v. Green, 470 S.W.2d 565 (Mo. 1971). A vigorous dissent challenged this factual finding; the majority in effect held that since there was a span of three hours between the threat and the escape, the inmate could have notified officials, a possibility deemed chimerical by the dissent.

There is no clear direction, of course, as to where one is to look to determine the composition of the wine to be poured into the *Griswold* bottle. If history and antiquity are to be our sole guides, then prisoners will have some difficulty in establishing the kinds of rights which have been suggested here. But the abortion cases, at least, and *Griswold* and *Stanley,* as well as the long list of search and seizure cases which overruled history, would seem to belie that path. Instead, it is highly probable, as many suggested immediately after *Griswold,* that the "fundamental liberties" of the ninth amendment will find their substance in the imaginations and good common sense of the nine Justices, and the lower courts. If that is to be the case, the courts must be pointed toward a new view of prisons, and prisoners, if they are to become receptive to the idea that prisoners have a right to dignity, privacy, and autonomy.